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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 297

INTERNATIONAL HARVESTER COMPANY OF AMERICA,
PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED JULY 9, 1912.

(23,285)

(23,285)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912.

No. 710.

INTERNATIONAL HARVESTER COMPANY OF AMERICA, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 17, 1912.

a COMMONWEALTH OF KENTUCKY:

Court of Appeals.

Pleas Before the Honorable the Court of Appeals of Kentucky, at the Capitol, at Frankfort, on the Tenth Day of April, 1912.

INTERNATIONAL HARVESTER COMPANY OF AMERICA, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Appeal from Breckinridge Circuit Court.

Be it remembered that heretofore, to-wit, on the 20th day of February, 1912, the appellant, International Harvester Company, by its counsel filed in the office of the Clerk of the Court of Appeals a transcript of record in words and figures following, to-wit:

1 COMMONWEALTH OF KENTUCKY,
County of Breckinridge:

Pleas Before the Hon. Weed S. Chelf, Judge of the Breckenridge Circuit Court, at the Court House, in the City of Hardinsburg, County and State Aforesaid, and on the Dates Hereinafter Mentioned.

No. 3214.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
INTERNATIONAL HARVESTER COMPANY OF AMERICA, Defendant.

Indictment.

Transcript of Record.

Be it remembered that heretofore on the 14th day of October, 1911, came the grand jury in open court and by their foreman in the presence of the whole grand jury presented to the court the following indictment which was ordered to be and was filed with the clerk in open court and it was ordered that summons issue on same.

Breckinridge Circuit Court.

COMMONWEALTH OF KENTUCKY
against
THE INTERNATIONAL HARVESTER COMPANY OF AMERICA.

Indictment.

The Grand Jury of Breckinridge County in the name and by the authority of the Commonwealth of Kentucky accuse the Interna-

tional Harvester Company of America of the offense of unlawfully and willfully enterin- into and becoming a member of and being a member of a pool, trust, combine, agreement, confederation and understanding with other companies, corporations and joint stock companies for the purpose of regulating, controlling and fixing the price of harvesting machinery, reapers, mowers, rakes, binders and repairs for the same, and to enhance the cost of said articles and machinery above its real and actual value, and did enhance same above its actual value, committed in manner and form as follows, to-wit: the said International Harvester Company of America on the — day of —, 191– in the county of Breckinridge and within twelve months before the finding of this indictment, did unlawfully,
2 and willfully enter and become a member of, and belong to a pol trust combine agreement confederation and understanding with the McCormick Harvesting Machine Company, the Deering Harvester Company, the Milwaukee Harvesting Machine Company, the Champion Machine Company, the D. M. Osborn Company, the Plano Machine Company and the International Harvester Company, a corporation, and other Companies and corporations to this Jury unknown, some of the aforesaid Companies are now and were corporations at the time of said combination and some of them are now and were at said time, joint stock companies, but which are joint stock companies and which are corporations this Jury does not know, nor does it know who are the members of any of the Joint Stock Companies, nor does it know in what State those that are and were in-corporated were incorporated, but says that said combination, agreement & confederation, pool, and understanding was made, and existed as aforesaid for the unlawful purpose of regulating, controlling, and fixing the price of harvesting and farm machinery, reapers, mowers, rakes, binders and repairs for same, manufactured and produced and to be manufactured and produced by them and controlled and to be controlled by them and to enhance the cost of said articles and machinery above its real and actual value, and said International Harvester Company of America, did within said time, in said County in pursuance of said unlawful pool trust combination, agreement, confederation and understanding regulate, control, and fix the price of farm machinery, mowers, reapers, rakes, binders, and repairs for same manufactured and controlled, and controlled by it to be manufactured and controlled by it, and by the aforesaid joint stock Companies and corporations, and did enhance the price of same above their real value, and did offer for sale and sell aforesaid machinery and repairs in said County within one year before the finding of this Indictment, at a price in
3 excess of the real value of said machinery which was done unlawfully and willfully by it in pursuance of said pool, trust Combine agreement, confederation and understanding.

Said International Harvester Company of America is now, was at all the time herein named, and for many years prior thereto, a corporation created and organized under and by the laws of the State of Wisconsin, and has for many years engaged in — Breckinridge

County, Kentucky, and said other Companies did business therein before its organization.

Contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the Commonwealth of Kentucky.

J. R. LAYMAN,
Commonwealth's Attorney of the Ninth Judicial District of Kentucky.

Witnesses:

J. A. Gray.
P. Dillon.
J. C. DeHaven.
Marvin Beard.

On the reverse side of this Indictment is found the following words and figures, to-wit:

No. 3214.

COMMONWEALTH OF KENTUCKY
vs.
INTERNATIONAL HARVESTER COMPANY OF AMERICA.

Indictment for Unlawfully entering into, becoming a member of, and being, a pool, trust combine, confederation and agreement for the purpose of controlling, fixing and enhancing the price of farming machinery above its real value and enhancing same above its real value.

A true bill.
N. T. MERCER,
Foreman of the Grand Jury.

Presented by the Foreman of the Grand Jury to the Court in the presence of the Grand Jury, and received from the Court by me and filed in open Court. Filed Oct. 14th 1911. Attest: Lee Walls, Clerk. Bail. 1911 Nov. 16 Sum & Copy and Spa. Issued.

Verdict of the Jury.

We, the Jury, find the within named —. Bail is fixed on this indictment at — Dollars —.

—— ——, *Judge.*

4 Thereupon on the 16th day of November, 1911 the Clerk issued Summons and Copy, which summons is as follows, to-wit:

Breckinridge Circuit Court.

Summons on Indictment.

The Commonwealth of Kentucky to any sheriff, coroner, jailer, constable, marshal, or policeman in this State:

You are hereby commanded to Summon International Harvester Company of America to appear in the Breckinridge Circuit Court on the first day of its next (February 1912) Term, to answer an indictment for misdemeanor, i. e., Unlawfully entering into and becoming a member of a pool trust combine, agreement, confederation and understanding with other Companies, for the purpose of controlling and enhancing its price of farming Machinery, &c. Found against it * * * in said Court.

Given under my hand as Clerk of said Court 16th day of November, 1911.

LEE WALLS, *Clerk.*
—— ——, *D. C.*

The return of the Sheriff on the foregoing Summons is as follows, to-wit:

Executed the within summons by delivering a true copy of the same to O. L. Pace, Chief officer and manging agent of the International Harvester Company of America found in Breckinridge County, Kentucky, its President and Vice President, secretary, librarian, Cashier, treasurer and clerk, being absent from said County. February 2, 1912.

DENNIE SHEERAN, *S. B. C.*,
By A. T. BEARD, *D. S.*

At a court continued and held for the Breckinridge Circuit Court on the 14th day of February, 1912 the following order was entered:

5 Breckinridge Circuit Court.

COMMONWEALTH OF KENTUCKY
v.
INTERNATIONAL HARVESTER COMPANY.

Indictment for Misdemeanor.

Motion.

The International Harvester Company, the defendant in the indictment herein found at the October, 1911, Term of the above named Court, enters now a special appearance for the purpose of moving to quash the return upon the process issued herein and purporting to be served upon this defendant by delivering a copy thereof to O. L. Pace, Agent of this defendant. And the defendant,

so entering a special appearance and appearing herein under protest, now moves the Court to quash the return upon said process because the defendant says that the said Pace was not at the time of the service of said process upon him, and has not since been, the agent of this defendant, nor was he then nor has he since been the president, vice-president, secretary, librarian, cashier, treasurer, clerk, managing agent, chief officer or agent, or manager or person in charge of the business of this defendant, in Breckinridge County, Kentucky, or at any place in the State of Kentucky or elsewhere; and this defendant was not at the time of the service of said process upon the said Pace, nor has it since been doing business in the State of Kentucky. And the defendant says that any proceeding taken upon said service would be beyond the jurisdiction of the Court, and that the said Court has no jurisdiction over the person of this de-
6 fendant by reason of said service; and defendant submits that any proceeding taken by virtue of said service herein will be null and void and will deny to this defendant the equal protection of the laws and will not be due process of law; and any proceeding taken herein upon said service will be in violation of the law of the State of Kentucky, and also in violation of the Constitution of the United States, and particularly the Fourteenth Amendment thereof; and to take any proceeding by virtue of said service would be an interference with and a burden upon Interstate Commerce, in violation of Article 1, Section 8, sub-section 3 of the Constitution of the United States.

Wherefore defendant prays the Court to quash the said process and to proceed no further herein.

The defendant filed in support of the above motion the Affidavit of J. L. Gardner, O. L. Pace, and William Browning, the plaintiff objected to said motion, and filed in support of his objection thereto, the affidavit of J. R. Layman and C. N. Schupp and certain exhibits attached thereto and had sworn and introduced as a witness M. D. Beard.

The Testimony of said Board is transcribed and set out in full in the paper filed herewith and made part hereof, marked "X." Said motion was submitted upon, said affidavits and testimony, and the Court being advised overruled said motion, to which the defendant excepts.

This Prosecution being called for trial and the defendant failing to appear or plead it is adjudged guilty by default, and its fine is fixed at Five Hundred Dollars. Wherefore it is adjudged by the
7 Court that the defendant, International Harvester Company of America, make good to the Commonwealth of Kentucky its fine in the Sum of Five Hundred Dollars, and the Cost of this Prosecution, and Execution may issued.

On the reverse side of this motion, is found the following: Entered in Order Book, #35, pages 248 & 249.

The affidavits of J. L. Gardner, O. L. Pace, William Browning, J. R. Layman, and C. N. Schupp, and the testimony of said Beard contained in the paper marked "X", referred to in said order are as follows:

8 Breckinridge Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
INTERNATIONAL HARVESTER COMPANY OF AMERICA, Defendant.

Affidavit.

This Affiant, O. L. Pace, states that he is the person upon whom the summons issued in the above entitled action was served, as the alledged agent of the defendant International Harvester Company of America. He states that he is not now, and was not at the time said summons was served upon him, an agent of said Company, nor was he then, nor is he now, the president, vice-president, secretary, librarian, cashier, treasurer, clerk, managing agent, chief officer or agent, or manager or person in charge of the business of defendant International Harvester Company of America, in Breckinridge County, Kentucky, or in the State of Kentucky, or in any County in the State of Kentucky, or elsewhere. He states that at the time of the service of said summons upon him, he was, and now is, employed by the defendant, International Harvester Company of America, as a solicitor, and not otherwise, and that as such solicitor his sole and only authority at said time was, and now is, to solicit proposals for the purchase of goods manufactured or held for sale by the defendant, and that such proposals when taken by him had then to be forwarded to the office of the defendant Company outside of the State of Kentucky, to-wit: To the Office of the General Agent located in the City of New Albany in the State of Indiana, there, in its discretion, to be accepted or rejected by the defendant at its said office. He says that said proposals so solicited by him were not binding upon the defendant company until first considered and accepted or
9 rejected by said Company at its said office outside of the State of Kentucky, and that said proposals and all proposals taken by him, upon their face state that they are not good or binding upon the defendant Company unless and until they are first accepted by the defendant Company at its said office which is outside of the State of Kentucky; that at the time of the service of said summons upon him, he had, and now has, no authority to contract or to be contracted with for or on behalf of the said defendant Company, and no right or authority to exercise any discretion or private judgment in the performance of his duties as such solicitor, or to compromise or adjust any claim or demand due said Company; that at the time of service of said process upon him, he was, and now is, only an employee of said defendant Company with only the right to solicit proposals, which then and if taken, were subject to rejection or acceptance by the defendant outside of the State of Kentucky, at its discretion, as hereinabove stated; that at said time he had, and now has, no authority to collect notes or other demands due said Company or settle or receipt for any notes, accounts or other demands due or owing to the Company.

Affiant further states that at the time said summons was served upon him, the defendant, International Harvester Company of America, was not nor is it now, doing any business in the County of Breckinridge or State of Kentucky, nor did it then have, nor has it now, any office, officer or agent in said County or State.

O. L. PACE.

Subscribed and sworn to before me by O. L. Pace, this 12th day of February, 1912.

My Commission expires the 17 day of Jan'y 1914.

[Seal Starling Wells, Notary Public, Hardin Co., Ky.]

STARLING WELLS,
Notary Public, Hardin Co., Ky.

On the reverse side of this is found the following:

1912. Feb'y 14th.—Filed in open Court. Attest: Lee Walls, C. B. C. C.

10 Breckenridge Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
INTERNATIONAL HARVESTER COMPANY OF AMERICA, Defendant.

Affidavit.

This affiant, J. L. Gardner, states that he is the General Agent of the defendant, the International Harvester Company of America, with his office as such general agent located in the City of New Albany, State of Indiana, and as such General Agent has, and for several years past has had, general charge and supervision of all the business and affairs of said defendant Company within a portion of the State of Kentucky including the County of Breckinridge. He says that at the time of the service of process herein upon O. L. Pace, he, the said Pace, was not nor since the time of said service of process, has he, the said Pace, been the agent of said defendant Company nor was he then, nor has he been since, nor is he now, the president, vice-president, secretary, librarian, cashier, treasurer, clerk, managing agent, chief officer or agent, or manager, or agent or person in charge of the business of said defendant, The International Harvester Company of America in the State of Kentucky, or in Breckinridge County, or elsewhere. He says that since, upon and prior to said date of service said Pace has been only an employee of said defendant Company, and nothing more, and that he, the said Pace is, and for sometime prior to said service of process upon him has been, employed by the defendant Company only as a solicitor taking written proposals for the purchase of goods belonging to, and held for sale by, the defendant Company; that as such solicitor said Pace since said date has had, and now has,

11 no right or authority in any wise to contract or be contracted with for or on behalf of said defendant Company.

Affiant states that the sole and only authority of said Pace since, and at the time of said service of process upon him was, and has been, to solicit proposals for the purchase of goods owned and held for sale by the defendant, International Harvester Company of America, which proposals are not binding upon said Company until forwarded to and accepted or rejected by said defendant Company through this affiant as its General Agent at its said place of business in New Albany, Indiana.

Affiant says that said Pace has no right to sell any goods for this defendant, nor has he, nor did he have at the time of the service of summons upon him herein, authority as such solicitor to collect any notes or obligations due said Company, nor to bind said Company by any contract whatsoever, nor to compromise in any way any claim or claims due to, or demands against said Defendant Company, nor the right to use or exercise his private judgment or discretion in any matter or matters connected with his duties as such solicitor, nor under his employment to do anything other than to solicit proposals, which proposals when and if taken must be forwarded by him to the General Agent of the Company at New Albany, Indiana for acceptance or rejection at his discretion, and do not become binding obligations upon, or contracts with, the defendant Company unless and until accepted as hereinabove stated.

Affiant states that occasionally, since said company ceased doing business in the State of Kentucky, there is placed in the hands of the solicitors of the defendant Company for collection, open accounts due the Company within the district in which such solicitor takes proposals, but only by special direction and authority
12 given to such solicitor has he authority to collect such accounts; that such accounts are placed in the hands of such solicitors by being forwarded to them from without the State of Kentucky, and that the solicitor in whose hands such accounts are placed has no right or authority to receipt such accounts in the name of the Company, but forwards to the defendant Company, outside of the State of Kentucky, the sum or amount received in payment of such accounts, and the receipt therefor is forwarded to the debtor by the Company from without said State; that only when so specially authorized has any solicitor the right to collect outstanding accounts due said defendant Company, and that no such right to collect exists by virtue of such solicitor's position as solicitor for said defendant Company.

Affiant further states that said defendant, International Harvester Company of America, for a considerable period of time prior to January 1st, 1912, has done no business in Breckinridge County, nor in the State of Kentucky, and at the time of said service of process herein upon said Pace, he, said Pace was not an agent of the defendant Company, and said defendant Company then had, and now has, no officer or agent of any kind, or person in charge of any business, in Breckinridge County, or elsewhere in the State of Kentucky, and that long prior to said date of said service of process upon said Pace, said defendant Company had entirely ceased doing business within said State.

Affiant further says that said defendant Company has, and since it ceased to do business in said State as aforesaid, has had, no agent or representative in the State of Kentucky, or in any County thereof who can, or has authority to, make any sale of its goods, or to make a contract for any sale of any property of the defendant; that when this affiant, as General Agent for said Company,
13 receives at his office in New Albany, Indiana, a proposal for goods from a solicitor in the State of Kentucky, and accepts such proposal, such goods so offered to be bought are shipped from without the State of Kentucky to the purchaser in said State, under, and in accordance with, the term of such accepted proposal; that the said defendant Company does not make or manufacture, and has never made or manufactured, any goods, implements or machinery within the State of Kentucky, and that it now has, and since it ceased to do business in said State of Kentucky, as hereinabove stated, the said Company has had, no place or depository for keeping its said goods or machinery anywhere within the State of Kentucky, and that all shipments of goods to purchasers within said State, are now made, and since said Company ceased to do business within said State, have been made, from outside the said State.

JAS. L. GARDNER.

Subscribed and sworn to by J. L. Gardner this 8th day of February, 1912. My Commission expires the 17th day of July, 1915.

MARY E. RICHARDS,
Notary Public in and for Floyd County, Indiana.

[Seal Notary Public, Floyd Co., Ind.]

On the reverse side of this Affidavit is as follows:
1912 Feb'y 14". Filed in Open Court. Attest: Lee Walls, C. B. C. C.

14 STATE OF KENTUCKY,
County of Breckinridge, ss:

In Breckinridge Circuit Court, — Term, 1912.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
INTERNATIONAL HARVESTER COMPANY OF AMERICA, Defendant.

STATE OF ILLINOIS,
County of Cook, ss:

Affidavit.

The Affiant, William Browning, being duly sworn, states that he is Vice-President and Sales Manager for the International Harvester Company of America, the defendant aforesaid, with his office as such Vice-President and Sales Manager located in the City of Chicago, State of Illinois, and as such Vice-President and Sales

Manager has, and for several years past has had, general charge and supervision of all the business and affairs of said Company throughout the United States; that said defendant is a corporation organized under the laws of the State of Wisconsin, and is, and for many years last past has been, engaged in the business of selling various agricultural implements and machines to local dealers; and that, on the seventh day of November, 1911, he sent, to all the company's general agents who negotiate any sales to any of the people of Kentucky and who are all located at points outside of said state, the following instructions:

"The Company's transactions hereafter with the people of Kentucky must be on a strictly interstate commerce basis. Travelers negotiating sales must not hereafter have any headquarters or place of business in that State, but may reside there.

15 Their authority must be limited to taking orders, and all orders must be taken subject to the approval of the general agent outside of the State, and all goods must be shipped from outside of the state after the orders have been approved. Travelers do not have authority to make a contract of any kind in the State of Kentucky. They merely take orders to be submitted to the general agent. If any one in Kentucky owes the Company a debt, they may receive the money, or a check, or a draft for the same but they do not have any authority to make any allowance or compromise any disputed claims. When a matter cannot be settled by payment of the amount due, the matter must be submitted to the general or collection agent, as the case may be, for adjustment, and he can give the order as to what allowance or what compromise may be accepted. All contracts of sale must be made f. o. b. from some point outside of Kentucky and the goods become the property of the purchaser when they are delivered to the carrier outside of the state. Notes for the purchase price may be taken and they may be made payable at any bank in Kentucky. All contracts of any and every kind made with the people of Kentucky must be made outside of that state, and they will be contracts governed by the laws of the various states in which we have general agencies handling interstate business with the people of Kentucky. For example, contracts made by the general agent at Parkersburg, W. Va., will be West Virginia contracts.

"If any one of the Company's general agents deviates from what is stated in this letter, the result will be just the same as if all of them had done so. Anything that is done that places the Company in the position where it can be held as having done business in Kentucky, will not only make the man transacting the business liable to a fine of from one hundred to one thousand dollars for each offense, but it will make the company liable for doing business in the states without complying with the requirements of the laws of the state. We will, therefore, depend upon you to see that these instructions are strictly carried out.

"Kindly acknowledge receipt, and oblige"

16 Affiant states that on or about the fourteenth day of October, 1911, the International Harvester Company of Amer-

ica closed all its places of business in Kentucky, shipped all of its tangible personal property out of said State of Kentucky, and has not, since that time, had any place of business or any property in said state; and that all its business with the people of Kentucky since on or about October 14, 1911, has been purely interstate commerce and has been transacted strictly in accordance with the instructions above set forth:

That on or about October twenty-eighth, 1911, said International Harvester Company of America revoked the authority of its designated agent in Kentucky, upon whom service of process might theretofore have been made, by filing, in the Office of the Secretary of State, notice of such revocation of authority; and has not since said last named date been doing or transacting any business in the State of Kentucky. Affiant further states that since January 1, 1912, and for some time prior thereto said defendant has not at any time had a known place of business in said Breckinridge County, nor has there been at any time since said January 1, 1912, any officer or agent of said defendant in said county upon whom service of process could be made or was authorized to be made, and that there has not been at any time since said last named date in the State of Kentucky any of the following-named officers or agents of said Company; namely, president, vice-president, secretary, librarian, cashier, treasurer, clerk, managing agent, chief officer or agent, or manager, or agent or person in charge of the business of said defendant, in the State of Kentucky; and that the only business of any kind transacted or done by any employee of said defendant with the people of Kentucky on behalf of the defendant has
17 been to receive orders for the merchandise of the defendant subject to the approval of its general agents outside of said state, which goods after the approval of such orders are to be shipped from points without said state, and that the only business since long prior to said January 1, 1912, conducted by said defendant, its officers or agents has been conducted in accordance with the instructions aforesaid and has been wholly interstate commerce, and that said defendant's employees in Kentucky since said October 14, 1911, have at no time had any right or authority to exercise any discretion or enter into any contracts in dealing with the people of Kentucky, save only to receive orders to be filled in accordance with the instructions heretofore set forth.

WILLIAM BROWNING.

Subscribed and sworn to by William Browning this twelfth day of February, 1912.

My Commission expires the 1st day of September, 1913.

FREDERICK D. OVIATT,
Notary Public, Cook County, Illinois.

[Seal Frederick D. Oviatt, Notary Public, Cook County, Ill.]

18 Breckinridge Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
INTERNATIONAL HARVESTER COMPANY OF AMERICA, Defendant.

Affidavit.

The affiant J. R. Layman states that he is, and has been for many years continuously Commonwealth's Attorney for the Ninth Judicial District of Kentucky. Which district is composed of Meade, Hardin, Breckinridge and Grayson Counties. He says that prior to Oct. 28, 1911 and at all the time since said date there has been pending in the courts of said district indictments against the defendant the International Harvester Company of America or penal actions and that he has been trying to aid the sheriffs of the different courts in which said actions have been pending in an effort to find some person on whom process might be served. He says that on the 7th day of October, 1910 a statement of said Company which is and was a corporation was filed in the office of the Secretary of State at Frankfort, Kentucky, designating J. L. Gardner of Louisville, Kentucky as the person upon whom process could be served as its agent and that its office named in said statement was located at the north west corner of Thirteenth and Maple Streets in the City of Louisville.

A copy of said statement is filed, with this affidavit marked "A" together with a certificate of C. F. Crecelius Secretary of State of Kentucky stating the correctness of same.

19 Affiant says that he is informed that W. C. Elliston is a deputy under the said Secretary of State and in his Office, and that he has been advised by said Ellison and numerous other persons that said International Harvester Company of America on Oct. 28, 1911 revoked the authority of said Gardner as its agent upon whom process could and might be served. And that said Gardner has not had any place of business in Kentucky but that he has been located in New Albany, Indiana and his Office and place of business is located in said City and State, and that he cannot be found in Kentucky, and does not stay in Kentucky.

Affiant further states that he is informed and believes that said cancellation of authority was done by said defendant with the purpose and intention of avoiding service of process in numerous indictments and penal actions pending and to be brought in Kentucky, one of which is and was the indictment herein. Affiant says that he is informed and believes that the president, vice president, secretary, cashier, librarian, treasurer and Clerk if defendant has all of said Officers, reside in another state other than Kentucky and have their offices and places of business outside of Kentucky and do not come into Kntucky.

Affiant filed herewith marked "B" from said W. C. Ellison a letter relative to said agency which is a part of his information on said subject and which is as follows:

OFFICE OF THE SECRETARY OF STATE,
FRANKFORT, *Feb.* 12, 1912.

Mr. J. R. Layman, Hardinsburg, Ky.

DEAR MR. LAYMAN: I have been handed your communication to this office dated Louisville, Ky. relative to the legally appointed agent of the International Harvester Co. I am sending you the last statement filed by this concern duly certified by Dr. Crecelius so you can use same as evidence. However since then on Oct. 28, 1911 this Company revoked the authority of this agent and at the present time they have no legally appointed agent in the State. When is the next time I will have to appear in Brandenburg in the Crouch Case?

Cordially yours, W. C. ELLISON.

Affiant says that prior to Oct. 28, 1911 and all during said time in 1911 the International Harvester Company of America a corporation engaged in business in Kentucky and numerous Counties thereof and each County of said Judicial District including Breckinridge County and had agents in said County of Breckinridge and other adjoining Counties through whom it sold farming machinery and repairs therefor and that O. L. Pace upon whom the summons in this case was served, was employed as agent of said Company and it was his duty as blockman, which position he held under said Company to make contracts with local sales agents of Breckinridge and other counties for the purpose of the sale of Machinery for said company and repairs thereof, and to make settlements with said agents for said Company and collect monies for them, and to have general control and supervision of the agents, machinery, repairs, collections and affairs generally of the business of said Company in several Counties, including the said County of Breckinridge. Affiant says that said Pace is still engaged by said Company as its agent as he is informed, and that he still handles farming machinery and repairs for said company and makes collections for said Company as directed and attends to any business they may desire attended to in said territory, all of which he has continued to do since the 28th day of October, 1911 up to the present time, and was so doing at the time the summons was served on him in this case.

Affiant further states that he is informed and believes that the contracts made by the agent with the said company was under which the sales complained of in the indictment were made and the contracts had were made by said Company by and through said Pace as the said agent of said Company, and some of the particular acts complained of in the indictment and business transacted was done by and through said Pace as agent for said Company.

Affiant says that he believes *that* the foregoing statements to be true.

J. R. LAYMAN.

Subscribed and sworn to before me by J. R. Layman this 14th, day of February, 1912.

LEE WALLS, *C. B. C. C.*

On the reverse side of this Affidavit is found the Following words and figures, to wit:

1912—February 14" Filed in Open Court. Attest: Lee Walls, C. B. C. C.

22 *Statement of Corporation Filed, Marked Exhibit "A".*

Said statement of Corporation is in words and figures, as follows, to-wit:

A True Copy.

Statement of Corporation (To be Filed in the Office of the Secretary of State Before Doing Business in This State).

To the Secretary of State, Frankfort, Ky.

SIR: Notice is hereby given that the place of business for the International Harvester Company of America (a corporation of the (Name of Corporation)
State of Wisconsin is in Kentucky located at the Northwest corner of 13th and Maple Street-, in the City of Louisville and that J. L. Gardner of Louisville Ky. is our agent—thereat, upon whom process may be served in any suit that may be brought against our Company within the State of Kentucky.

Done at Chicago this 7th day of October 1910.

[SEAL.] R. C. HASKINS, *President.*
—— ——, *Secretary.*

This statement may be signed by President or Secretary.

Filed and recorded Oct. 11th, 1910.
On the reverse side of this Statement is found the following:

Statement of Corporation.

(Name.)	Place of Business.
.....	..... Ky.
.....	Corporation of.....
.....	Book No.....
Filed and recorded.	Page No.....
.....191–.	Box.....

23 On the reverse side of Statement of corporation is also found the following:

Agents upon Whom Process May Be Executed.

All corporations except foreign insurance companies formed under the laws of this or any other State, and carrying on any business in this State, shall at all times have one or more known

places of business in this State, and an authorized agent or agents thereat, upon whom process can be served; and it shall not be lawful for any corporation to carry on any business in this State, until it shall have filed in the office of the Secretary of State * * * a statement, signed by its president or secretary, giving the location of its office or offices in this State, and the name or names of its agents or agents thereat upon whom process can be served; and when any change is made in the location of its office or offices, or in its agent or agents, it shall at once file with the Secretary of State a statement of such change; and the former agent shall remain agent for the purpose of service until statement of appointment of the agent is filed; and if any corporation fails to comply with the requirements of this section, such corporation, and any agent or employé of such corporation, who shall transact, carry on or conduct any business in this State, for it, shall be severally guilty of a misdemeanor and fined not less than One Hundred Dollars nor more than One Thousand Dollars for each offense.—Section 571, Kentucky Statutes.

Recording Fee—$1.00.

24 *Certificate.*

COMMONWEALTH OF KENTUCKY,
Office of the Secretary of State:

(Certificate.)

I, C. F. Crecelius, Secretary of State for the Commonwealth of Kentucky, do certify that the foregoing writing has been carefully compared by me with the original record thereof, now in my official custody as Secretary of State and remaining on file in my office, and found to be a true and correct copy of The Statement of Corporation, of The International Harvester Company of America, as filed by that concern in this office, Oct. 7th, 1910.

In witness whereof, I have hereunto set my hand.

Done at Frankfort this 12th day of February, 1912.

C. F. CRECELIUS,
Secretary of State.

1912—Feb'y 14". Filed in Open Court. Attest: Lee Walls, Clerk Breckinridge Circuit Court.

25 LETTER MARKED EXHIBIT "B."

Said Letter is as follows:

(United We Stand, Divided We Fall) Kentucky.

C. F. Crecelius, Secretary.

Office of Secretary of State, Frankfort.

FEBRUARY TWELFTH, 1912.

Mr. J. R. Layman, Hardinsburg, Ky.

DEAR MR. LAYMAN: I have been handed your communication to this office, dated Louisville, Ky., relative to the legally appointed agent of The International Harvester Company., I am sending you the last statement filed by this concern duly certified by Dr. Crecelius so you can use same as evidence, however since then, on Oct. 28th, 1911, this Co. revoked the authority of this agent and at the present time they have no legally appointed agent in the State. When is the next time I will have to appear in Brandenburg in the Crouch Case?

Cordially yours,

W. C. ELLISTON.

On the reverse side of this letter is found the following words and figures, to-wit:

1912, Feb'y 14". Filed in Open Court. Attest: Lee Walls, C. B. C. C.

26 Breckinridge Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,

vs.

INTERNATIONAL HARVESTER COMPANY OF AMERICA, Defendant.

Affidavit.

Affiant, C. N. Schupp, says he is now and has been continuously for more than one year last past a Deputy Sheriff of Jefferson County, Kentucky, under A. M. Emler, Sheriff of Jefferson County.

Affiant says that during the month of October and prior to the 28th of October, 1911 he received process from the Hardin Circuit Court in case of Commonwealth of Kentucky vs. International Harvester Company of America; that at said time one J. L. Gardner was the agent of said International Harvester Company upon whom process could be served and he was designated as the agent in the statement filed in the office of the Secretary of State. The location of the office of said defendant was designated as 13th and Maple Streets, City of Louisville as provided by Section 571 of Kentucky Statutes.

Affiant says that between the 13th of October, 1911 and the 28th of October, 1911 he went to the office of said agent at 13th & Maple Streets for the purpose of serving process upon said agent
27 but was unable to find him at said place and said office had from indications been closed. Affiant then went to the place of residence of said agent, J. L. Gardner at 111 West Oak Street and made inquirys as to the whereabouts of said Gardener and received no satisfactory answer from those who resided in the same house in which Gardener resided, but this information led him to believe and he says it is true that said Gardener during said period was in New Albany, Indiana and affiant is informed, believes, and so charges that said J. L. Gardener left the State of Kentucky for the purpose of preventing the serving of process upon him in any suit in which the defendant, International Harvester Company of America, was a party.

Affiant says he is informed, believes, and says it is true that upon October 28th, 1911 the name of said J. L. Gardener was withdrawn from the office of the Secretary of State as the agent or defendant upon whom process could be served and since said time said defendant has had no statement on file in the office of Secretary of State, giving the name of an agent in this State upon whom process could be served or the location of the defendant's office in this State at which said agent could be found.

Affiant is informed, believes, and charges it to be true that since said October 28th, 1911 said defendant, International Harvester Company of America has had no agent in this State as designated by Section 571 of Kentucky Statutes upon whom process could be served.

CHAS. N. SCHUPP.

Subscribed and sworn to before me this 12th day of Feb. 1912. My Commission expires on the 13 day of February, 1912.

C. L. DETERT,
Notary Public, Jefferson County, Ky.

On the reverse side of this affidavit is found as follows:

1912, Feb. 14". Filed in open court. Attest: Lee Walls, C. B. C. C.

28 EXHIBIT X.

Breckinridge Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
INTERNATIONAL HARVESTER COMPANY OF AMERICA, Defendant.

Transcript of Evidence.

The Testimony of M. D. Beard, Heard Before the Hon. Weed S. Chelf, Judge of the Breckinridge Circuit Court, on the 14th Day of February, 1912, on a Motion in the Above Styled Case.

Said witness having been duly sworn, deposed as follows:

Direct examination by J. R. LAYMAN, Com'th Att'y:

Q. What is your name?
A. M. D. Beard.
Q. Mr. Beard were you an agent of the International Harvester Company, or the firm with which you work, B. F. Beard & Co., an agent of the International Harvester Company, at Hardinsburg, in Breckinridge County?
A. I don't know whether you would call us agents or not, we were selling their machines.
Q. How were you selling them?
A. For a commission. I don't know whether you would call it a commission contract or not, any-how, it was under a contract.

Counsel for defendant objected to this unless the contract is produced.

29 Q. Have you got that contract?
A. I won't be positive, but I think they took it up. They asked me for it and I think I gave it to them.
Q. To the Company?
A. Yes, sir.
Q. When was that taken up?
A. Well, now, I couldn't say positively about that either, but it was sometime before the first of the year.
Q. What in your opinion was the——
A. Well, it must have been the latter part of November.
Q. Did your agency with them continue up to that time?

Judge HUMPHREY: He hasn't said it was an agency.

A. Well, the contract really expires after we settle with them each year. The settlement is due the first of September.
Q. Have you had any dealings with them since that time?
A. Nothing except the mowing machines we carried over.
Q. Were they their machines or were they your machines?
A. They belonged to the Company.

Q. The International Harvester Company of America?
A. Yes, sir.
Q. How long did you keep them for the Company, when did you cease to keep them for the company?
A. I think it was in November that we settled for those machines.
Q. Who did you settle with?
A. This man Jim Bondurant.
Q. Who was Bundurant acting for?
A. International Harvester Company.
Q. Who was he under if you know?

Mr. FAUREST: Unless you know more than Bondurant's
30 statement, that wouldn't be competent.

Q. Did you execute a note?
A. Yes, sir.
Q. Who did you execute the note to?
A. The International Harvester Company.
Q. Who has got that note?
A. They have.
Q. For that Machinery?
A. Yes, sir.
Q. Where did you execute that note to the International Harvester Company?
A. Well, really I don't know. I never noticed the——
Q. Where were you?
A. In my office in the store.
Q. Over here?
A. Yes, sir.
Q. To whom did you deliver it?
A. Jim Bondurant.
Q. Have you seen that note since?
A. No, Sir.
Q. Were the machines then turned over to you?
A. Yes, sir.
Q. By whom?
A. By the same man, Jim Bondurant.
Q. Do you still have those machines?
A. Yes, sir.
Q. And now own them?
A. Yes, sir.
31 Q. Now what time in November to the best of your recollection?
A. Well, now, I don't remember, I couldn't say.
Q. Who was blockman for the company prior to that time?
A. Mr. Pace.
Q. What Mr. Pace?
A. I forget his first name.
Q. Orville Pace?
A. That is it, yes sir.
Q. Now what did he do as blockman?
A. Well, he makes these contracts.
Q. With the agents?

A. Yes, sir, he made the contract with me, the blockman generally makes the settlements, that is, in paying for the goods that we have sold, he generally closes for those.

Q. Closes for them and makes contracts with the agents?

A. Yes, sir, but he didn't do that in my case, this man Bondurant made the settlement with me, but Pace made the contract.

Q. Did Pace say anything to you about the settlement?

A. Really I don't know.

Q. Don't remember?

A. The settlement date is September 1st, and they can't always get a man to everybody on September 1st, and I always sent in a check for about the amount that we owe them, then whenever they have time their man comes around and we finish the settlement with him.

Q. Well, now, have you had any other dealings with them at any time since this purchase of the machinery left in your possession and the execution of the note?

32 A. No, sir.

Q. Got any improvements from them of any kind, any repairs?

A. Well, we are ordering repairs every few days for machines throughout the country.

Q. How is that done?

A. Well, we simply order them and pay for them now.

Q. You order them and pay for them?

A. Yes, sir, as we get them.

Q. Order them for various persons?

A. Yes, sir.

Q. Does anybody else here act for the company?

A. No one that I know of.

Q. You have the exclusive authority to act for them in the way of ordering things?

A. I don't understand your question—No, only for certain machines.

Q. What machines do you handle?

A. We handle the McCormack.

Q. And all repairs for it?

A. Yes, sir.

Judge HUMPHREY: This man don't claim to be their agent?

Mr. LAYMAN: Oh, no.

Cross-examination by Judge A. P. HUMPHREY, for Def't:

Q. Well, Mr. Beard, as I understand you, on the first of September, 1911, you had certain machinery that you had received from the International Harvester Company, and for which you hadn't settled, is that a fact?

33 A. Yes, sir.

Q. And on the first of September you sent them what you believed to be substantially the amount due to the Harvester Company for that machinery?

A. No, not for that machinery, for the machinery that we had sold during the year 1911, up to that time.

Q. Now that left you with some machinery still on hand?

A. Yes, sir.

Q. And then as I understand you, sometime in November, 1911, you gave a note to the International Harvester Company for the machinery then on hand?

A. Yes, sir.

Q. And I understand that since then you have been ordering from time to time such repairs or machinery as you desired to buy?

A. That is right.

Q. And you order them in your own name from New Albany, Indiana?

A. Yes, sir.

Q. And they are sent to you from there and you pay for them?

A. Yes, sir.

(And further the witness sayeth not.)

34 STATE OF KENTUCKY,
County of Breckinridge, sct:

I, Allan R. Atkinson, Official Stenographer in and for the County and State aforesaid, do certify that upon motion of Attorney for Comth. and by Order of Court, I took down in short-hand notes all the evidence given by the witness, M. D. Beard upon this occasion, and thereafter transcribed the same upon a typewriter, and that the foregoing 7 pages is a true and complete transcript of my notes so taken.

Witness my hand as Official Stenographer aforesaid, this 14th day of February, 1912.

ALLAN R. ATKINSON,
Official Stenographer 9th Judicial District.

35 At a Circuit Court Continued and held in Hardinsburg, Ky., for the Breckinridge Circuit Court on Friday, the 16th day of February, 1912. The following order was entered. Said order is as follows, to-wit:

Breckinridge Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
INTERNATIONAL HARVESTER COMPANY OF AMERICA, Defendant.

Order.

Came the defendant, International Harvester Company of America, and moved the Court to set aside the Judgment heretofore entered herein, adjudging this defendant guilty by default and fixing its fine at Five Hundred Dollars, because said judgment is and was void, and this defendant had not been served with process and this

Court had no jurisdiction over the defendant. To which the plaintiff objected, and the Court being advised, overruled said motion and refused to set aside said Judgment, to which action of the Court and all other orders and judgments entered herein, the defendant excepts and from all orders and judgments entered herein defendant prays an appeal to the Court of Appeals, which is granted upon condition that defendant file the Transcript of the Record in the Office of the Clerk of the Court of Appeals within Sixty Days.

36 COMMONWEALTH OF KENTUCKY,
County of Breckinridge:

I, Lee Walls, Clerk of the Breckinridge Circuit Court, in and for the County and State aforesaid, do hereby certify that the foregoing 38 pages contains a full, true, and complete Transcript of the Record and proceedings in the case Wherein Commonwealth of Kentucky, is Plaintiff, and The International Harvester Company of America is Defendant, No. 3214, in an action lately pending in the aforesaid Court, as the same appears of Record, and now on file in my Office

Witness my Hand as Clerk of the Breckinridge Circuit Court, aforesaid, this the 29th day of July, 1911.

LEE WALLS,
Clerk Breckinridge Circuit Court.

37 With and endorsed on the foregoing transcript the appellant by its counsel made the following statement, to-wit:

Court of Appeals.

INTERNATIONAL HARVESTER COMPANY OF AMERICA, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Statement.

This is an appeal from a judgment of the Breckinridge Circuit Court tendered at its February 1912 Term Feb. 14 1912 and on pages 5 and 35 of the Record the latter being rendered Feb. 16 1912 no process is required.

A. M. RUTLEDGE,
L. A. FAUREST,
HUMPHREY & HUMPHREY,
For Appellant.

J. R. Layman, Att'y for Appellee, Elizabethtown, Ky.

Afterwards at a Court of Appeals held in and for the Commonwealth of Kentucky at the Capitol in the City of Frankfort on the 20th day of February, 1912, the following order was made, to-wit:

INTERNATIONAL HARVESTER COMPANY OF AMERICA
vs.
COMMONWEALTH OF KY.

Breckenridge.

Came the parties by counsel and filed an agreement herein
38 and the appellant by counsel moved the court by consent to docket, advance and set this case for oral argument at the present term, which motion is submitted.

Afterwards, to-wit, on the 21st day of February, 1912, the following order was entered herein:

INTERNATIONAL HARVESTER CO.
vs.
COMMONWEALTH.

Breckinridge.

The court being sufficiently advised, the motion herein to advance, docket and set this case for argument is sustained and the said case is ordered to be docketed, advanced and set for argument at the present term.

Afterwards, to-wit, on the 1st day of March, 1912, at a Court of Appeals held as aforesaid, the following order was entered, to-wit:

INTERNATIONAL HARVESTER CO.
vs.
COMMONWEALTH.

Breckinridge.

This case coming on to be heard was argued by J. R. Layman and Charles Carroll for appellee and A. P. Humphrey for appellant and submitted.

Afterwards at a Court of Appeals held in and for the Commonwealth of Kentucky as aforesaid on the 10th day of April, 1912, the following orders and judgment were entered herein:

INTERNATIONAL HARVESTER COMPANY OF AMERICA, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Appeal from Breckinridge Circuit Court.

The court being sufficiently advised it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed. Which is ordered to be certified to said court.

It is further considered that appellee recover of appellant its cost herein expended.

39 At the same time, to-wit, April 10, 1912, the Court of Appeals of Kentucky delivered an opinion in words and figures following, to-wit:

Court of Appeals of Kentucky, April 10, 1912.

INTERNATIONAL HARVESTER COMPANY, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Appeal from the Breckenridge Circuit Court.

Opinion of the Court by Judge Miller, Affirming.

At the October Term 1911 of the Breckenridge Circuit Court, the Grand Jury returned an indictment against the International Harvester Company of America, under section 3915 of the Kentucky Statutes, as amended March 26, 1906, charging it with being a member of a pool, trust or combination with other companies, for the purpose of regulating and controlling the price of harvesting machinery and to enhance the cost thereof above its reasonable value.

Process having issued upon the indictment, it was executed in the manner indicated by the return thereon, which reads as follows:

"Executed the within summons by delivering a true copy of the same to O. L. Pace, Chief Officer and managing agent of the International Harvester Company of America found in Breckenridge County, Kentucky, its President and Vice-President, secretary, librarian, Cashier, treasurer and clerk, being absent from said County. February 2, 1912.

DENNIE SHEERAN, *S. B. C.*,
By A. T. BEARD, *D. S.*"

On February 14, 1912, the appellant entered a special appearance for that purpose only, and moved the court to quash the return upon the process, upon the grounds recited in the motion, that it was a Wisconsin corporation; that it was not carrying on any business in Kentucky at the time the process was served; that O. L. Pace was not its officer or agent of any description; that to proceed upon said service would be in violation of the law of Kentucky, and of the Fourteenth Amendment to the Constitution
40 of the United States, because it did not constitute due process of law; and also that it was in violation of the interstate commerce clause of the Federal Constitution.

Upon the hearing of the motion, appellant read the affidavits of O. L. Pace, J. L. Gardner and William Browning; while the Commonwealth read the affidavits of J. R. Layman and C. N. Schupp, with certain exhibits, and introduced M. D. Beard, who testified

orally. The proof upon the part of the Harvesting Company shows, in substance, that it was carrying on business in Kentucky in the usual way, until sometime in October 1911; and, pursuant to section 571 of the Kentucky Statutes, it had appointed J. L. Gardner as its agent upon whom process could be served; that it had ceased to do business in Kentucky, and had not done business therein since sometime prior to November 1, 1911; that on October 28, 1911, it had revoked the authority of Gardner to receive process for it, by filing a formal revocation in the office of the Secretary of State; that Pace, the person upon whom the process was served, had formerly been employed by the appellant as a "blockman", with authority to transact certain business for the Harvesting Company in Kentucky; that prior to November 1, 1911, the Harvesting Company had removed all of its property and business office from the State of Kentucky to New Albany, Indiana, and had revoked the authority of all its agents, including Pace; that since that time its only transaction with the people of Kentucky had been the soliciting of proposals for its harvesting machines by means of traveling solicitors, Pace being one of them; that these traveling solicitors had no authority to bind the company in any way, but they merely took orders from proposed customers, and that these orders were of no validity until accepted by the company at a point outside of the State, and when so accepted the goods thus sold were shipped to Kentucky from a point outside of the State, where the title passed to the purchaser. The proof upon the part of the Commonwealth shows that the Harvesting Company had moved out of the State in order to avoid the prosecution
41 of indictments and penal actions against it; that some of the particular acts complained of in the indictment and the business so transacted, was done by and through said Pace as agent for said company; that Gardner had endeavored to avoid service of process upon him, which had issued out of the Hardin Circuit Court upon an indictment or penal action there pending; that one Beard had a commission contract with the Harvester Company which expired on September 1, 1911, and that he having left in his hands certain machinery belonging to the Harvester Company, and which he had not sold, Bondurant, an agent of the Harvester Company had a settlement with him for this machinery in November 1911, under which Beard purchased the machinery and gave his note payable to the order of the Harvester Company, for the purchase price.

The circuit judge overruled appellant's motion to quash the return upon the process, and the appellant having failed to appear or plead, was fined $500.00, the lowest penalty prescribed by the statute for the offense charged in the indictment. Subsequently, the Harvester Company moved to set aside this judgment, upon the ground that it was a void judgment; and this motion having been overruled, the Harvester Company appeals to this court for a reversal.

The only question involved, therefore, is whether there was such a service of process upon the Harvester Company that would sustain the judgment rendered.

Under section 147 of the Kentucky Code of Practice in Criminal

Cases, the summons in criminal cases must be served in the same manner as a summons in civil cases.

Sub-section 3 of section 51 of the Civil Code of Practice provides for the service of process in an action against a private corporation, as follows:

"In an action against a private corporation the summons may be served, in any county, upon the defendant's chief officer, or agent, who may be found in this State; or it may be served in the county wherein the action is brought upon the defendant's chief officer or agent who may be found therein."

42 Sub-section 6 of said section 51, reads as follows:

"In actions against an individual residing in another State, or a partnership, association, or joint stock company, the members of which reside in another State, engaged in business in this State, the summons may be served on the manager, or agent of, or person in charge of, such business in this State, in the county where the business is carried on, or in the county where the cause of action occurred."

Section 732 of the Civil Code of Practice, providing for the construction of the Code, declares that unless a different intention be expressed, or be shown by the context, the following rule, among others, shall prevail:

"The chief officer or agent of a corporation which has any of the officers or agent herein mentioned is: First, its president; second, its vice-president; third, its secretary or librarian; fourth, its cashier or agent; fifth, its clerk; sixth, its managing agent."

It is first contended that the service is insufficient under sub-section 6 of section 51, above quoted, because that section does not specifically include corporations within its terms.

Section 208 of the Constitution, however, provides:

"The word corporation, as used in this Constitution shall embrace joint stock companies and associations."

And, pursuant to this constitutional provision, section 457 of the Kentucky Statutes, regulating the construction of statutes, provides:

"The word 'corporation', 'company', may be construed as including any corporation, company, person, persons, partnership, joint stock company or association."

In construing these provisions in Adams Express Company v. Schofield, 111 Ky., 832, it was held that the words "corporation" and "company", should be so construed as to include any corporation, company, person, persons, partnership, joint stock company or association, thus making the terms "corporation" and "association" synonymous within the meaning of these statutory provisions for the service of process.

It seems reasonably clear therefore that appellant, although it be a corporation, is equally within the scope and meaning of sub-section 6 of section 51 of the Code.

43 It is not necessary to inquire whether the sheriff's return is in proper form, since it may be amended if the record shows that the proper person was served. Nelson Morris & Co. v.

Rehkopf & Sons, 25 Ky. L. R., 352, 75 S. W., 203; Cumberland v. Lewis, 32 Ky. L. R., 1300.

The real question, therefore, is this: Was Pace an agent, under sub-section 3, or under sub-section 6 of section 51, above quoted, that process served upon Pace will sustain a judgment against appellant? Was the Harvester Company engaged in business in the State of Kentucky, and was Pace its agent in charge of such business at the time the summons was served upon him? If these questions are to be answered in the affirmative, the service is admittedly good, and the judgment a valid one.

The Code provision above referred to was passed upon and upheld by this court, under varying states of fact, in Boyd Commission Co. v. Coates, 24 Ky. L. R., 730, 69 S. W., 1091; Nelson Morris & Co. v. E. Rehkopf & Sons, 25 Ky. L. R., 352, 75 S. W., 203; Guenther v. American Steel Hoop Co., 116 Ky., 580; Wortham v. The Illinois Life Insurance Co., 32 Ky. L. R., 827, 107 S. W., 176; Johnson v. Wuesterfield's Adm'r, 143 Ky., 10, and other cases.

A trading corporation is personally present for the purpose of jurisdiction whenever it has established a place of trade. The difficulty arises in determining what amounts to the establishment of a place of trade.

In Chattanooga N. B. & L. A. v. Denson, 189 U. S., 408, the granting of a loan by a Tennessee Building and Loan Association to a citizen of Alabama upon the latter's signed application, solicited by a traveling agent of the association, and taking a note and mortgage executed in Alabama as security for the loan, constituted a doing of business in Alabama, regardless of the form and terms of the note and mortgage.

44 The general rule is thus stated in 19 Cyc., 1327:

"The distinction is clearly this: If the foreign corporation confines its operations to the State within which it was created, it cannot be sued in a State where it has no office and transacts no business, by serving process on its president or other officer or agent when accidentally present within such State. Such officer or agent does not represent the corporation, or carry with him his official or representative character into a State where the coporation has done no business and has not established any office. But when a foreign corporation sends its officers into another State, and does business there, it is liable to be brought into the courts of such State by a service of process upon such officers, so acting for it, and a judgment founded upon such service will be good everywhere."

Perhaps the best general discussion of this subject is to be found in Mr. Justice Field's opinion in St. Clair v. Cox, 106 U. S., 350. In the course of that opinion Justice Field said:

"It is sufficient to observe that we are of opinion that when service is made within the State upon an agent of a foreign corporation, it is essential, in order to support the jurisdiction of the court to render a personal judgment, that it should appear somewhere in the record—either in the application for the writ, or accompanying its service, or in the pleadings or the findings of the court—that the corporation was engaged in business in the State."

And, in construing the statutes of Michigan, which are, in effect, substantially the same as ours, he said:

"Her statutes expressly provide for suits being brought by them in her courts; and for suits by attachment being brought against them in favor of residents of the State. And in these attachment suits they authorize the service of a copy of the writ of attachment, with a copy of the inventory of the property attached, on 'any officer, member, clerk, or agent of such corporation' within the State, and give to a personal service of a copy of the writ and of the inventory on one of these persons the force and effect of personal service of a summons on a defendant in suits commenced by summons.

It thus seems that a writ of foreign attachment in that State is made to serve a double purpose,—as a command to the officer to attach property of the corporation, and as a summons to the latter to appear in the suit. We do not, however, understand the laws as authorizing the service of a copy of the writ, as a summons, upon a-agent of a foreign corporation, unless the corporation be engaged in business in the State, and the agent be appointed to act there. We so construe the words 'agent of such corporation within this State.' They do not sanction service upon an officer or agent of the corporation who resides in another State, and is only casually in the State, and not charged with any business of the corporation there."

In reviewing this question in the late case of the Good Roads Machinery Co. v. Commonwealth, 146 Ky., 692, we said:

45 "In Nelson Morris & Co. v. E. Rehkopf & Sons, 75 S. W., 203, 25 Ky. L. R., 352, a broker living in Paducah wired to Nelson Morris & Co., of Chicago, asking their price on hides. The broker was supplied with a quotation, and with this quotation before him sold the hides to Messrs. Rehkopf & Sons at Paducah. He forwarded the order to Nelson Morris & Co., who accepted it and filled it. Suit was brought against Nelson Morris & Co., by Rehkopf & Sons, the summons issuing upon the petition being served upon the broker, Bransford Clark, under sub-section 6, of Section 51, of the Civil Code. The service was upheld by this court; but the opinion was specific in remarking that Bransford Clark was the agent 'as to this transaction,' and further pointed out that the action arose 'out of this transaction.'

In Wortham et al. v. Illinois Life Insurance Co., 107 S. W., 176, 32 Ky. L. R. 827, Mr. Leslie M. Rue, an insurance man of Harrodsburg, in conjunction with an insurance man from Louisville, insured the life of Mrs. Wortham in a company not regularly represented by either of them. Mr. Rue had a commission upon this business. He collected the first three premiums due on the policy. Mrs. Wortham did not pay the fourth premium and died shortly after its due date. Action was brought upon the policy by the beneficiaries named in it. Their claim was that the policy was in force, notwithstanding the failure to pay the premium, because of her alternative right to extended insurance, provided for in the policy, as she had given notice to the company, through Mr. Rue, of her desire to use her accumulations for that particular purpose.

This court held that the testimony above outlined about this transaction was sufficient to take the case to the jury upon the question of Rue's agency, as to this matter.

In Boyd Commission Co. v. Coates, 69 S. W., 1091, one R. L. Carter was the Clinton, Kentucky, correspondent of the Boyd Commission Co., a brokerage concern of St. Louis. The Commission Company had a private wire into Carter's office, for which he paid them rental. He would transmit over this wire orders obtained by him for the purchase of stocks of various kinds, for which he charged one-fourth of one per cent commission on all deals made with his customers. The company bought these stocks on the market and divided the commission with Carter. The Commission Company paid all losses incurred on these deals and appropriated all the profits except the commission paid to Carter. In an action arising out of one of these particular transactions service was had upon Carter, under sub-section 6, of section 51, Civil Code. The court held that Carter was the agent, and sustained the service. It will be noted that Carter was acting regularly from day to day with a private wire between his own office and that of his principal.

In Johnson v. Wuesterfield's Admr., 143 Ky., 10, the service was had upon an Indiana owner of a steamboat doing business in Kentucky, by service upon the captain and master of the boat in Kentucky. This court upheld the service, saying that the captain 'had entire and complete charge, not only of Johnson's business in Kentucky, but of the particular business that had caused the injury which was the subject of the action.'"

This is not the case of a single business transaction performed within the State by some agent other than Pace, but it is a case where all or the principal part of the business that appellant does in the State is managed by and in charge of Pace.

46 The question is not to be controlled by the extent of the agent's authority, but by the extent and scope of the business done and the agent's connection therewith. As was pertinently said in Good Roads Machinery Co. v. Commonwealth, 146 Ky., 695;

"It is not the presence or absence of a specific contract of agency or a specific execution of a commission of agency, but the acts and facts proven in each particular case, which determine the existence or non-existence of the agency."

A single sale negotiated by a special agent for that particular instance, renders the selling agent the agent of the non-resident seller for the service of summons in a suit concerning that particular transaction, although he might not be for a different transaction. Nelson Morris & Co. v. Rehkopf & Sons, 25 Ky. L. R., 352, 75 S. W., 203.

But where the agent has general charge of the business done in the State, even though his powers be limited, he becomes "the manager, or agent, or person in charge of such business in this State," for the service of process. The Code provision does not confine the service of process to the agent; it includes the manager and the person in charge of the business in this State.

But if the service of the summons should be confined to the de-

fendant's agent, the service in the case at bar would nevertheless be sufficient, since Pace was appellant's agent having charge of its business in this State. It must be conceded that appellant was doing business of a certain kind, in Kentucky.

Appellant's contention, as we understand it, is that an agent for the purposes of service of process, must have such contractual powers that enable him to bind his principal; and that since Pace could, under his authority, solicit orders only, which became binding upon their acceptance by the principal, he was not an agent for the service of process.

This, however, is too narrow a view of the law of the case.

> Agency is a representative relation; in its broadest sense it
> 47 includes every relation in which one person acts for or represents another by his authority. 31 Cyc., 1189. It is upon

this principle that service of process against the agent is upheld in criminal prosecutions and in cases of tort. Commonwealth v. Bullock, 22 Ky. L. R, 528; Carpenter v. Laswell, 23 Ky. L. R., 686.

Turning to the proof in this case, we find that prior to January 1912, the appellant was doing a general business through its agents in the State of Kentucky, with a properly designated agent therein upon whom process could be served. Its general office was then in Louisville. After the removal of its office from Louisville to New Albany, Indiana, the method of conducting its business is perhaps best shown by the general instructions sent to all the company's general agents on November 7th, 1911, which reads as follows:

"The company's transactions hereafter with the people of Kentucky must be on a strictly interstate commerce basis. Travelers negotiating sales must not hereafter have any headquarters or place of business in that State, but may reside there. Their authority must be limited to taking orders, and all orders must be taken subject to the approval of the general agent outside of the State, and all goods must be shipped from outside of the State after the orders have been approved.

Travelers do not have authority to make a contract of any kind in the State of Kentucky. They merely take orders to be submitted to the general agent. If any one in Kentucky owes the company a debt, they may receive the money, or a check, or a draft for the same but they do not have any authority to make any allowance or compromise any disputed claims. When a matter cannot be settled by payment of the amount due, the matter must be submitted to the general or collection agent, as the case may be, for adjustment, and he can give the order as to what allowance or what compromise may be accepted. All contracts of sale must be made f. o. b. from some point outside of Kentucky and the goods become the property of the purchaser when they are delivered to the carrier outside of the State. Notes for the purchase price may be taken and they may be made payable at any bank in Kentucky. All contracts of any and every kind made with the people of Kentucky must be made outside of that State, and they will be contracts governed by the laws of the various States in which we have general

agencies handling interstate business with the people of Kentucky. For example, contracts made by the general agent at Parkersburg, W. Va., will be West Virginia contracts.

If any one of the company's general agents deviates from what is stated in this letter, the result will be just the same as if all of them had done so. Anything that is done that places the company in the position where it can be held as having done business in Kentucky, will not only make the man transacting the business liable to a fine of from one hundred to one thousand dollars for each offense, but it will make the company liable for doing business in
48 the State without complying with the requirements of the laws of the State. We will, therefore, depend upon you to see that these instructions are strictly carried out".

The agents were thereby authorized to take orders for goods in Kentucky, and in case a customer in Kentucky owed the company, the agents were authorized to receive money, checks, or drafts in payment thereof. Notes for the purchase price of machinery sold in Kentucky are taken by the agent, and made payable at any bank in Kentucky. At the time the summons was served upon Pace, he was a solicitor taking proposals for the purchase of appellant's goods, in substantially the same general way that the business was formerly conducted in the State, with the exception, it is claimed, that the proposals must now be accepted by the general manager at New Albany, Indiana, and not at Louisville, Ky. But evidently this is a mere change in form rather than of substance, since the authority now conceded to its traveling men was, in law, the same, and no more, than they had under the law previous to appellant's crossing from the south bank to the north bank of the Ohio River.

Charles Brown Grocery Co. v. Becket, 22 Ky. L. R., 393, 57 S. W. 458; John Matthews Apparatus Co. v. Renz, 22 Ky. L. R., 1530; Seven Hills &c., v. Chase, 26 Ky. L. R., 336; Becker Co. v. Alvey, 27 Ky. L. R., 836.

But if we should look to the decisions of other jurisdictions in determining the question whether appellant was doing business in Kentucky, within the meaning of our statute, it would seem that the case of the International Text-Book Co. v. Pigg, 217 U. S., 91, is conclusively against appellant's contention that it is not so engaged in business.

In the Pigg case, the Text-Book Company conducted a correspondence school at Scranton, Pa., and had a salaried solicitor-collector at Topeka, Kansas, who solicited applications for
49 scholarships and collected and remitted the fees therefor. The company had no office in Kansas, and its teaching was conducted wholly by correspondence with the home office at Scranton. It will thus be seen that the relation of the Text-Book Co. to its Kansas solicitor-collector, was, in its legal effect, substantially the same as the relation of appellant to its solicitor-collector Pace in Kentucky. If, however, it should be said that there is a difference in the fact that Pace had no right to make contracts for appellant, while the Text-Book Company's solicitor-collector had that right,

the criticism is sufficiently answered by the opinion in the Pigg case, which ignored that distinction, and held that the continued and permanent value of the business and the like representation of the company by its solicitor-collector as distinguished from a mere casual act or representation determined the question of business and agency. The question arose in a suit by the Text-Book Co. against one of its students to recover a subscription fee, and the defense was that the company was doing business in Kansas and had failed to comply with the laws of that State, which required a foreign corporation to file with the State Charter Board, its charter, with an extended statement of the condition and affairs of the corporation, accompanied by a fee, as a condition precedent to its right to do business in Kansas. The Supreme Court of the United States held that the Text-Book Company was doing business in Kansas.

We conclude from the evidence before us, that the appellant was doing business in the State of Kentucky at the time the process was served upon Pace, and that Pace was appellant's agent in charge of said business, within the meaning of the Code provisions above quoted.

2. It is insisted, however, that the business of appellant in Kentucky is interstate commerce, and that the carrying on of interstate commerce by appellant with persons residing in Kentucky does not constitute "doing business in Kentucky". This is a novel proposition; and, strictly considered, it would seem to be a matter of defense upon the merits, rather than a ground for quashing the return upon the summons, since the indictment charges no act that can be construed into an interstate business transaction. This contention would make the service of process a part of interstate commerce, and not a separate question dependent upon the doing of business in the State, or the agency of Pace.

In support of this proposition appellant relies upon Commonwealth v. Hogan Co., 25 Ky. L. R., 41, 74 S. W., 738, and Commonwealth v. Eclipse Hay Press Co., 31 Ky. L. R., 824. Those cases, however, were prosecutions under section 571 of the Kentucky Statutes, to recover penalties from foreign corporations for failing to file, in the office of the Secretary of State, a statement giving the name of a resident agent upon whom process might be served. Those cases merely decided that the State could not impose that burden upon interstate commerce; not that interstate commerce did not constitute doing business in the State. No such question was raised or decided.

It is well settled that a State cannot impose any condition upon interstate business that materially or directly burdens that business; and it has been held, in a uniform line of decisions by this court, that imposing a license upon such business, or requiring the filing of a statement with the Secretary of State as a condition to the transaction of interstate business, was such a burden. Commonwealth v. Hogan, 25 Ky. L. R., 41, 74 S. W., 737; Commonwealth v. Eclipse Hay Press Co., 31 Ky. L. R., 824; Three States Buggy Co. v. Commonwealth, 32 Ky. L. R., 385, 105 S. W., 971; Milburn Wagon Co. v. Commonwealth, 139 Ky. 330.

The cases of Crutcher v. Kentucky, 141 U. S., 47; International Text-Book Co. v. Pigg, 217 U. S., 91; Commonwealth v. Read Phosphate Co., 113 Ky., 32; Commonwealth v. Parlin, 118 Ky., 168; Milburn Wagon Co. v. Commonwealth, 139 Ky., 330; Brennan v. Titusville, 153 U. S., 289; and Caldwell v. North Carolina, 187 U. S., 621, some of which are relied upon by appellant, likewise
51 involve the right of a municipality to impose and collect a tax upon interstate commerce, and come within the general rule above announced. But the service of a summons upon an agent imposes no burden upon appellant's business; it is not required to pay a tax, obtain a license, or file a statement with a State officer as a condition to its right to do interstate business in Kentucky.

In International Text-Book Co. v. Pigg, supra, the court said:

"It is true that the statute does not, in terms, require the corporation of another State engaged in interstate commerce to take out what is technically 'a license' to transact its business in Kansas. But it denies all authority to do business in Kansas unless the corporation makes, delivers and files a 'statement' of the kind mentioned in section 1283. The effect of such requirement is practically the same as if a formal license was required as a condition precedent to the right to do such business. In either case it imposes a condition upon a corporation of another state seeking to do business in Kansas, which, in the case of interstate business, is a regulation of interstate commerce and directly burdens such commerce. The state cannot thus burden interstate commerce. It follows that the particular clause of section 1283 requiring that 'statement' is illegal and void.

"In this connection it may be observed that by the statute the doors of Kansas courts are closed against the Text-Book Company, unless it first obtains from the secretary of state a certificate showing that the 'statement' mentioned in section 1283 has been properly made. In other words, although the Text-Book Company may have a valid contract with a citizen of Kansas, one directly arising out of and connected with its interstate business, the statute denies its right to invoke the authority of a Kansas court to enforce its provisions unless it does what we hold it was not, under the Constitution, bound to do; namely, make, deliver and file with the secretary of state the statement required by section 1283.—

"It is sufficient to say that the requirement of the statement mentioned in section 1283 of the statute imposes a direct burden on the plaintiff's right to engage in interstate business, and therefore is in violation of its constitutional rights. It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business. But such a burden is imposed when the corporation of another state, lawfully engaged in interstate commerce, is required, as a condition of its right to prosecute its business in Kansas, to make and file a statement setting forth certain facts which the state, confessedly, could not control by legislation."

In that case the Text-Book Company was required to conform to an unauthorized requirement, before it could collect its debt by judi-

cial proceedings, and for that reason alone the judgment of the Kansas court was reversed. The same is true of the Texas
52 cases—Albertype Co. v. Gus Feist Co., 114 S. W., 791; Eclipse P. & M. Co. v. New Process R. & S. Co., 120 S. W., 533; and Moroney H. Co. v. Goodwin Pottery Co., 120 S. W. 1091—relied upon by appellant. No such state of fact exists in the case at bar. On the contrary, appellant has been indicted in Kentucky for doing an unlawful act in Kentucky; and the offense charged is not directly or necessarily connected with interstate commerce. Appellant seeks to avoid the effects of its alleged unlawful act committed in Kentucky by showing, that aside from the unlawful act charged, it has so arranged its business as to give it the character of interstate business. But it is not charged that the unlawful act is a part of its interstate business, and clearly it cannot be, from its very nature.

If the criminal laws of a State could be successfully evaded by connecting the illegal act, at some point in its development, with some other act so as to give the illegal act the color of an interstate act of business, it would then become an easy matter to avoid responsibility in many cases of this character.

The absence of merit in appellant's contention, even as a defense, will be seen from the language of the court in Standard Oil Co. of Kentucky v. Tennessee, 217 U. S., 413. In that case the Oil Company, a Kentucky corporation, was ousted from Tennessee for a violation of the Tennessee anti-trust act. Claiming that the judgment of ouster was contrary to the 14th. amendment to the federal constitution, and also that it was an unconstitutional interference with commerce among the States—the same defenses that are here relied upon—the Oil Company appealed the case to the Supreme Court of the United States; but in affirming the judgment of the Tennessee Court, the Supreme Court of the United States said:

"The second objection to the statute is that, although construed by the court to apply to domestic business only, nevertheless it is held to warrant turning the defendant out of the state for an interference with interstate trade. The transaction complained of was inducing merchants in Gallatin to revoke orders on a rival company for oil to be shipped from Pennsylvania, by an agreement to give them 300 gallons of oil. It is said that as the only
53 illegal purpose that can be attributed to this agreement is that of protecting the defendants' oil aginst interstate competition, it could not be made the subject of punishment by the state; that the offense, if any, is against interstate commerce alone.

The cases that have gone as far as any in favor of this proposition are those that hold invalid taxes upon sale by traveling salesmen, so far as they effect commerce among the states. Robbins v. Taxing Dist., 120 U. S., 389; Rearick v. Pennsylvania, 203 U. S., 507. These cases fall short of the conclusion to which they are supposed to point. Regulations of the kind that they deal with concern the commerce itself, the conduct of the men engaged in it, and as so engaged. The present statute deals with the conduct of third persons, strangers to the business. It does not regulate the business at all. It is not even directed against interference with

that business specifically, but against acts of a certain kind that the state disapproves in whatever connection. The mere fact that it may happen to remove an interference with commerce among the states as well with the rest does not invalidate it. It hardly would be an answer to an indictment for forgery that the instrument forged was a foreign bill of lading, or for assault and battery, that the person assaulted was engaged in peddling goods from another state. How far Congress could deal with such cases we need not consider, but certainly there is nothing in the present state of the law, at least, that excludes the states from a familiar exercise of their power. See Field v. Barber Asphalt Paving Co., 194 U. S., 618, 623".

In our view, this case presents only the question of appellant's doing business in the State, and Pace's agency. Appellant's business transaction constituting interstate commerce, may or may not affect the trial; they do not affect the validity of the summons. The indictment does not deal with them, and its scope is not to be enlarged or diminished by affidavits filed upon a motion to quash the return upon the summons. Furthermore, upon the trial the Commonwealth may confine its proof to intra-state matters. We cannot anticipate that it will depart from the terms of the indictment. The unsoundness of appellant's contention in this respect becomes apparent when its effect is considered, in case it should be upheld and applied in practice. If the summons is to be quashed and the prosecution thereby ended, we have the anomalous situation of the violation of a substantive criminal law tried and finally disposed of in a question of procedure, upon ex-parte evidence; and
the question of appellant's guilt can never be tried because it
54 proposes to do nothing but interstate business. Surely it
was never intended that the wise constitutional provision for the protection of bona fide commerce among the States, should or could thus be indirectly used as a shield to protect the offender from punishment for an illegal act not directly connected with interstate commerce. It is difficult to comprehend how a conspiracy may be viewed as an act of interstate commerce; and if the crime charged is not such an act, the offender is not to escape trial by showing that its agent upon who mthe summons was served, was, pursuant to the conspiracy and entirely within the State, engaged collaterally in interstate commerce. Appellant is charged with having conspired, in Kentucky, with other like companies to do certain unlawful acts; not with selling to them or to others, by sales which may have constituted interstate commerce. In our opinion the summons was properly served, and constitutes a valid process against the appellant.

Judgment affirmed.

James Garnett, Att'y. Gen'l., Carroll & Carroll, T. C. Carroll, and J. R. Layman, for Appellee.

Humphrey & Humphrey, Arthur M. Rutledge and L. A. Faurest, for Appellant.

[Endorsed:] April 10, 1912. International Harvester Co., vs. Com'l'th.

55 Afterwards, to-wit, on the 19th day of June, 1912, the appellant and plaintiff in error, International Harvester Company of America, filed in the Clerk's office of the Court of Appeals of Kentucky, its Assignment of Errors, which is in words and figures following, to-wit:

Supreme Court of the United States.

INTERNATIONAL HARVESTER COMPANY OF AMERICA, Plaintiff in Error,

v.

COMMONWEALTH OF KENTUCKY, Defendant in Error.

Assignment of Errors.

The International Harvester Company of America, Plaintiff in Error, assigns the following errors which it claims were committed by the Court of Appeals of Kentucky in affirming the judgment of the Circuit Court of Breckinridge County, Kentucky:

1. The Court erred in holding that the plaintiff in error had been served with process to appear in this cause, by the delivery of a copy of the summons to O. L. Pace, when it appears from the record that the said Pace was not such an agent of the plaintiff in error as would justify the service of a process upon the plaintiff in error by delivery of a copy thereof to him; and, therefore, the judgment rendered, based upon said service of process, should have been held to be void; and holding the same valid was a denial to the plaintiff in error of due process of law, and was contrary to the Fourteenth Amendment of the Constitution of the United States.

56 2. The Court erred in holding that the plaintiff in error had been served with process to appear in this cause, by delivery of a copy of the summons to O. L. Pace, when it appears from the record that the plaintiff in error was not, at the time of such service, doing business in Kentucky, and, therefore, the judgment rendered based upon said service of process should have been held to be void; and holding the same valid was a denial to the plaintiff in error of due process of law, and a violation of the Fourteenth Amendment to the Constitution of the United States.

3. The Court erred in holding that the plaintiff in error had been served with process in this cause by the delivery of a copy of the summons to O. L. Pace, when it appears from the record that at the time of such service the plaintiff in error was a corporation organized under the laws of the State of Wisconsin, and not a corporation of the State of Kentucky, and was carrying on no business in Kentucky, but, so far as Kentucky was concerned, was engaged solely in interstate commerce; and the holding such service valid and sufficient upon which is found a judgment against the plaintiff in error was and is a burden upon and a regulation of interstate commerce, contrary to Article 1, Section 8, sub-section 3 of the Constitution of the United States.

4. The Court erred in holding that the plaintiff in error had been served with process to appear in this cause by the delivery of a copy of the summons to O. L. Pace, when it appears from the record that the plaintiff in error was, at the time of such service, a corporation of the State of Wisconsin, and not a corporation of the State of Kentucky, and that the said Pace had no authority from the plaintiff in error to make any contract of any character binding upon it, but was solely engaged in soliciting orders for the
57 goods of the plaintiff in error, to be accepted and filled beyond the boundaries of the State of Kentucky, and constituting, in their execution, interstate commerce; and, therefore, the judgment rendered, based upon said service of process, should have been held to be void, because holding it valid was and is an interference with and a burden upon interstate commerce, in violation of Article 1, section 8, sub-section 3 of the Constitution of the United States.

5. The Court erred in holding that sub-section 6 of section 51 of the Civil Code of Practice of Kentucky, authorizing the service of process upon the plaintiff in error by the delivery of a copy of the summons to O. L. Pace when it appears from the record that the said O. L. Pace was simply a solicitor of the plaintiff in error, without authority to contract, and when it appears that the plaintiff in error was a corporation organized under the laws of the State of Wisconsin, and not a Kentucky corporation, and was engaged, so far as Kentucky was concerned, solely in interstate commerce, as said sub-section of said section so construed was and is an interference with and a burden upon interstate commerce, in violation of Article 1, section 8, sub-section 3 of the Constitution of the United States.

6. The Court of Appeals further erred in affirming the judgment rendered against the plaintiff in error by said Circuit Court, because the petition upon which such judgment was based did not state a cause of action against the plaintiff in error, because the Anti-Trust Act of Kentucky is void for these reasons:

a. To construe the Act of the Legislature of Kentucky, approved March 21, 1906, otherwise than as a repeal of the Act of May 20, 1890, would be violative of the Constitution of the United States, and especially the Fourteenth Amendment thereof, in that
58 it would deny to the plaintiff in error the equal protection of the law.

b. To construe and enforce the Act of May 20, 1890, Section 198 of the Constitution of Kentucky, and the Act of March 21, 1906, so as to make the sale of an article above its real value or below its real value, a penal offense, such value to be determined by a jury upon the trial of the cause, would be violative of the Constitution of the United States and particularly the Fourteenth Amendment thereof, in that this would not be due process of law, and would deny to the plaintiff in error the equal protection of the law.

c. The Statutes of Kentucky under which this action is prosecuted, viz, the Acts of May 20, 1890, and March 21, 1906, as construed and applied by the Court of Appeals of Kentucky, are in

conflict with the Constitution of the United States, and particularly with the Fourteenth Amendment thereof, for the following reasons, among others, viz: that the said statutes operate to deny to the plaintiff in error the equal protection of the law, and to deprive the plaintiff in error of its property without due process of law, in that it is denied the right to sell its property at the true value thereof; and, further, in that it is subject to fine if it sells its property at a price which a jury may thereafter determine to be more than the real value thereof, under the uncertain rules engrafted upon said statutes by decisions of the Court of Appeals of Kentucky.

ALEXANDER P. HUMPHREY,
ALEXANDER P. HUMPHREY, JR.,
Attorneys for Plaintiff in Error.

Filed Jun- 19, 1912.
ROBT. L. GREENE, *C. C. A.*

59 On the same day, to-wit, June 19, 1912, the plaintiff in error filed in the Clerk's office in the Court of Appeals of Kentucky its original Writ of Error allowed by the Chief Justice of the Court of Appeals, and which is attached hereto as follows:

60 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Court of Appeals of Kentucky, Greeting:

Because in the record of proceedings, as also in the rendition of the judgment, of a plea which is in the said Court of Appeals of Kentucky, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the International Harvester Company of America, Plaintiff in Error, and The Commonwealth of Kentucky, Defendant in Error, wherein was drawn in question the validity of a statute of, or an authority exercised under, said Commonwealth of Kentucky on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of such validity and manifest error hath happened, to the great damage of said International Harvester Company of America, Plaintiff in Error, as by its complaint appears, we, being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 17 day of July, 1912, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further
61 to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this the 18 day of June, 1912, and of the Independence of the United States of America the 136th year.

[Seal United States of America, Eastern Kty. Dist. Court.]

JOHN W. MENZIES,
Clerk United States District Court,
Eastern Dist. of Ky., at Frankfort,
By CHAS. N. WIARD,
Deputy Clerk.

Allowed by

J. P. HOBSON,
Chief Justice of the Court of Appeals of Kentucky.

Filed Jun- 19, 1912.

ROBT. L. GREENE, *C. C. A.*

62 At the same time, to-wit, on June 19, 1912, said plaintiff in error filed in the Clerk's office of the Court of Appeals of Kentucky its Writ of Error Bond, which is in words and figures following, to-wit:—

Court of Appeals of Kentucky.

INTERNATIONAL HARVESTER COMPANY OF AMERICA, Plaintiff in Error,

v.

COMMONWEALTH OF KENTUCKY, Defendant in Error.

Know all men by these presents: That we, the International Harvester Company as Principal, and The Title Guaranty and Surety Company, as surety, are held and firmly bound unto the Commonwealth of Kentucky in the sum of one thousand Dollars for payment of which well and truly to be made, we, the International Harvester Company of America, Principal, and The Title Guaranty and Surety Company, as surety, bind ourselves jointly and severally firmly by these presents.

Witness our hands and seals this 18th day of June, 1912.

The condition of this obligation is such that where as the said Commonwealth of Kentucky instituted a certain action against the International Harvester Company of America, claiming a penalty of Five Thousand ($5,000) Dollars, and judgment was rendered accordingly in the Breckinridge Circuit Court in the sum of Five Hundred ($500.00) dollars and subsequently an appeal was taken from said judgment to the Court of Appeals of Kentucky, which affirmed the same; and, whereas, the said International Harvester Company of America has sued out a writ of error from the

63 Supreme Court of the United States to reverse said judgment of the Court of Appeals of Kentucky.

Now, therefore, if the above bounden International Harvester Company of America shall prosecute said writ of error to effect and answer the judgment, all damages and costs, if it fail to make good this appeal, then this obligation shall be void, otherwise to remain in full force and effect.

INTERNATIONAL HARVESTER COMPANY OF AMERICA,
By ALEX. P. HUMPHREY, JR.
THE TITLE GUARANTY AND SURETY COMPANY,
By ALEX. P. HUMPHREY, JR.

The above and foregoing bond is approved this June 18 1912.

J. P. HOBSON,
Chief Justice of the Court of Appeals of Kentucky.

Filed Jun- 19, 1912. Robt. L. Greene, C. C. A.

64 Know all men by these presents:—

That the Title Guaranty & Surety Company, of Scranton, Pennsylvania, a corporation organized under the laws of the State of Pennsylvania, has made, constituted and appointed, and by these presents does hereby make, constitute and appoint either Alex. P. Humphrey or Alex. P. Humphrey, Jr., its true, sufficient and lawful attorney, with full power and authority to make, execute and deliver, for it, in its name and in its behalf, as surety, a bond or undertaking as follows:—

A bond in the Court of Appeals of Kentucky on behalf of the International Harvester Company of America, being a bond to supersede a judgment of the Court of Appeals of Kentucky rendered against the International Harvester Company of America in re International Harvester Company of America against the Commonwealth of Kentucky, being a bond on appeal from the said judgment to the Supreme Court of the United States, the original judgment in said action having been rendered by the Circuit Court of Breckinridge County, Kentucky, hereby giving its said attorney full power and authority to do everything whatsoever requisite and necessary to be done for the purpose of making, executing and delivering such obligation as fully as the officers of said The Title Guaranty & Surety Company, could do if personally present, and hereby ratifying and confirming all that its said attorney shall lawfully do or cause to be done by virtue hereof, but reserving to itself full power of substitution and revocation.

In witness whereof, The Title Guaranty & Surety Company has caused its corporate seal to be hereunto affixed, and these presents to be duly executed by Samuel K. Bland, General Agent, at Louisville, Kentucky, on this 13th day of May, 1912.

65 [SEAL.]

THE TITLE GUARANTY & SURETY COMPANY,
By SAMUEL K. BLAND,
General Agent at Louisville, Kentucky.

Filed Jun- 19, 1912. Robt. L. Greene.

At a regular meeting of the Executive Committee of the Board of Directors of The Title Guaranty & Surety Company, of Scranton, Pennsylvania, held at the office of the Company in the City of Scranton, on the Fourth day of April, 1908, the following Resolution was adopted:

"Resolved, That Samuel K. Bland, General Agent of this Company at Louisville, in the State of Kentucky, be and he is authorized and empowered to make, execute and deliver in behalf of the Company, unto such person or persons, in the State of Kentucky, as he may select, its power of attorney constituting and appointing each such person its Attorney-in-Fact, with full power and authority to make, execute and deliver, for it, in its name and in its behalf, as Surety, any particular bond or undertaking that may be required in the State of Kentucky, the nature of such bond or undertaking to be in each case specified in such power of attorney."

66 STATE OF PENNSYLVANIA,
County of Lackawanna, ss:

I, Fred'k K. Tracy Assistant Secretary of The Title Guaranty & Surety Company, hereby certify that I have compared the foregoing copy of resolution with the original thereof, as recorded in the Minute Book of said Company, and that the same is a correct and true transcript therefrom, and of the whole of said original resolution.

Given under my hand and the seal of the Company at the City of Scranton, Pennsylvania, this 27th day of April, 1908.

FRED'K K. TRACY,
Assistant Secretary.

STATE OF KENTUCKY,
County of Jefferson, ss:

On this day personally appeared before me, a Notary Public in and for the State and County aforesaid, Samuel K. Bland, known to me to be the General Agent of The Title Guaranty & Surety Company at Louisville in the State of Kentucky, and as such he did thereupon acknowledge and deliver the foregoing instrument of writing as and for the act and deed of The Title Guaranty & Surety Company.

Witness my hand and seal, this 13th day of May, 1912.

[SEAL.] WM. W. GAUNT, *N. P., J. C.*

My Notarial Commission will expire Jan. 16th 1916.

67 On the same day, to-wit, June 19, 1912, there was filed in the office of the Clerk of the Court of Appeals the original citation and proof of service endorsed thereon, and which is attached hereto as follows:—

68 UNITED STATES OF AMERICA, *ss:*

To Commonwealth of Kentucky, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington thirty (30) days after the date hereof, pursuant to a writ of error filed in the Clerk's Office of the Court of Appeals of Kentucky, wherein International Harvester Company of America is Plaintiff in Error, and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the Plaintiff in Error, as in the said Writ of Error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable J. P. Hobson, Chief Justice of the Court of Appeals of Kentucky, this 18 day of June, 1912.

J. P. HOBSON,
Chief Justice of the Court of Appeals of Kentucky.

Citation accepted for the Commonwealth of Kentucky, Defendant in Error, this 18 day of June, 1912.

JAMES GARNETT,
Attorney General for Kentucky.

Filed Jun- 19, 1912. Robt. L. Greene, C. C. A.

69 COMMONWEALTH OF KENTUCKY,
Court of Appeals, sct:

In obedience to the commands of the attached Writ of Error, I hereby transmit to the Supreme Court of the United States, a complete transcript of the record with all things touching the same, in the case of International Harvester Company of America vs. Commonwealth of Kentucky on appeal from the Breckenridge Circuit Court, as the same appears from the records and files of my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of my office.

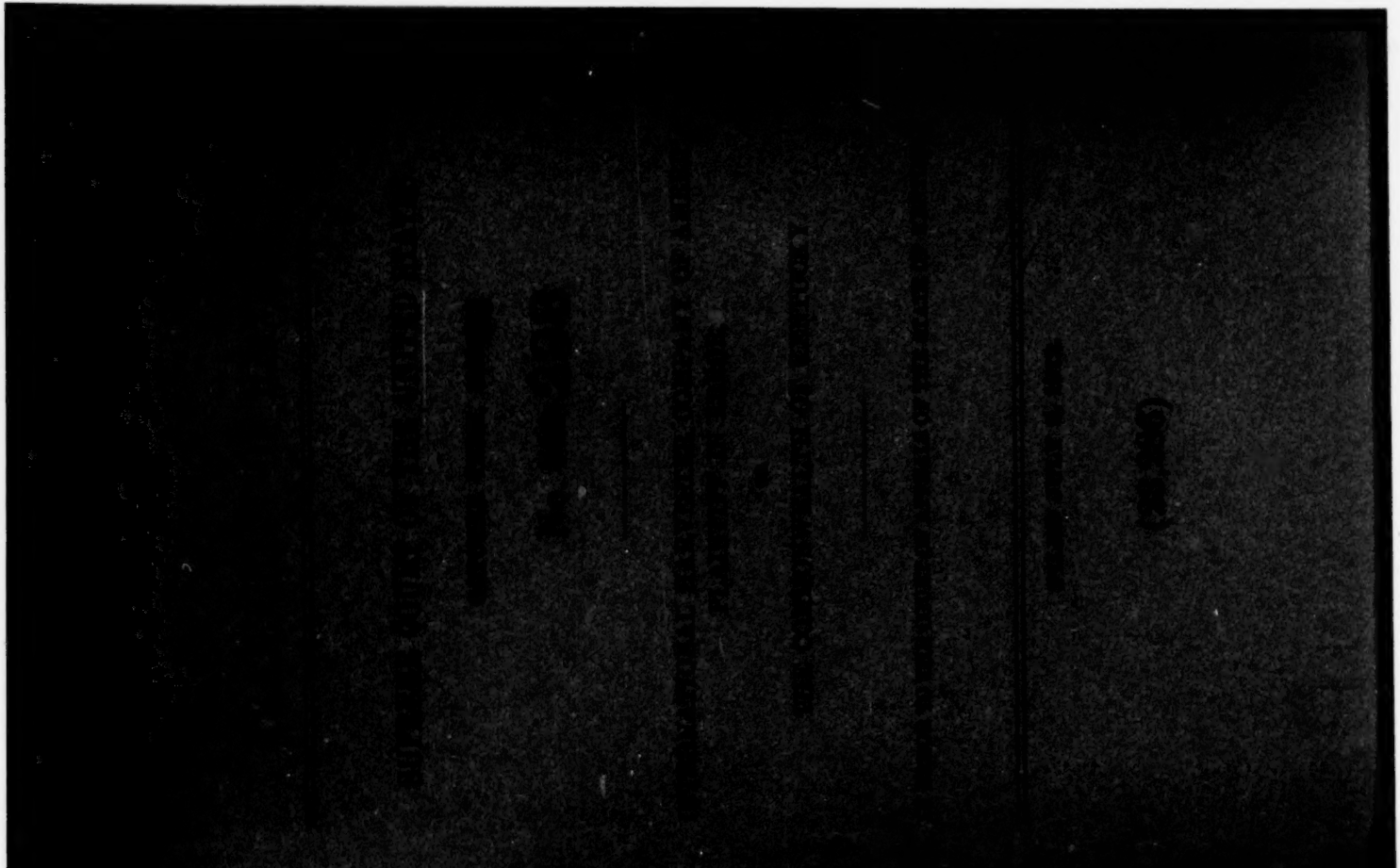
Done at the Capitol in the City of Frankfort, Kentucky, on this the 27th day of June, A. D., 1912.

[Seal Kentucky Court of Appeals.]

ROBERT L. GREENE,
Clerk of the Court of Appeals of Kentucky.

Fee for this transcript $25.15.

Endorsed on cover: File No. 23,285. Kentucky Court of Appeals. Term No. 710. International Harvester Company of America, plaintiff in error, vs. The Commonwealth of Kentucky. Filed July 9th, 1912. File No. 23,285.



(23,286)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 711.

INTERNATIONAL HARVESTER COMPANY OF AMERICA, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 18, 1912.

a THE COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

Pleas Before the Honorable the Court of Appeals of Kentucky, at the Capitol, in the City of Frankfort, on the 13th Day of June, 1912.

INTERNATIONAL HARVESTER COMPANY OF AMERICA, Appellant,
vs.
THE COMMONWEALTH OF KENTUCKY, Appellee.

Appeal from Boyle Circuit Court.

Be it remembered that heretofore, to-wit, on the 18th day of May, 1912, the appellant, the International Harvester Company of America by its attorneys filed in the Clerk's office of the Court of Appeals a transcript of record, which is in words and figures following, to-wit:

1 STATE OF KENTUCKY,
County of Boyle:

Boyle Circuit Court, April Term, 1912.

Pleas had before Hon. Chas. A. Hardin, Judge of the Boyle Circuit Court, had at the Court House in Danville, Boyle County, Kentucky, on the 1st Day of May, 1912, in the following styled penal action.

Caption.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
INTERNATIONAL HARVESTER COMPANY OF AMERICA, Defendant.

Petition.

The plaintiff, Commonwealth of Kentucky, says that the defendant, International Harvester Company of America, is now and has been continuously for many years past a corporation; that it was incorporated under the laws of the state of Wisconsin, and defendant has for many years continuously been engaged in business in this state and in Boyle County, Kentucky.

Plaintiff says that in Boyle County, Kentucky, the defendant within one year before the filing of this petition unlawfully and willfully entered into and became a member of a pool, trust, combine, agreement, confederation, or understanding with the
2 McCormack Harvester Machine Company, the Deering Harvester Company, the Milwaukee Harvester Machine Com-

pany, the Champion Machine Company, the D. M. Osborne Company, the Plano Machine Company, the International Harvester Company, a corporation, and other companies and corporations to plaintiff unknown, some of above named companies are corporations and some joint stock companies but which are corporations and which joint stock companies plaintiff does not know, nor does it know who are the members of said joint stock companies, nor does it know in what states or state those that are corporations are incorporated, for the purpose of regulating, controlling and fixing the price of harvesting and farm machinery, reapers, mowers, rakes, binders and repairs of same, manufactured and produced by them and controlled and to be controlled by them and to enhance the costs of said articles above their real value.

Plaintiff says that said defendant did in Boyle County, Kentucky, within one year before the filing of this petition in pursuance of said unlawful pool, trust, combination, agreement, confederation and understanding regulate control and fix the price of harvesting and farm machinery, reapers, mowers, rakes, binders, and repairs of same, manufactured and controlled and to be manufactured and controlled by said defendant and by aforesaid stock Co.'s and by aforesaid corporations and did enhance the price of same above their real value and did offer for sale and sell aforesaid machinery in Boyle County, Kentucky, within one year before the filing of this petition at a price in excess of the real value of aforesaid machinery, and this was done unlawfully and willfully by said
3 defendant in pursuance of the unlawful pool, trust, combine, agreement, confederation, and understanding hereinbefore set out. All in violation of the statute in such cases made and provided, and by reason thereof defendant became indebted to plaintiff in the sum of Five Thousand Dollars.

Wherefore, Plaintiff prays judgment against defendant in the sum of Five Thousand Dollars, ($5000.00), for its costs herein expended and for all proper relief.

GEO. D. FLORENCE.
Commonwealth's Attorney, 13th Judicial District of Kentucky.

Filed with the petition is the following exhibit:

EXHIBIT.

Executed the within summons by delivering a true copy of the same to J. G. Carlton chief officer and managing agent in the State for the International Harvester Company of America for Boyle County, Kentucky, its president, vice president, secretary, librarian cashier treasurer and clerk being absent from Boyle County and said International Harvester Company of America having no officer, or agent in or for Boyle County who may be found therein.

W. L. McCARTY,
Sheriff of Lincoln Co., Ky.,
By W. S. EMBRY, *D. S.*

The following summons was issued upon the filing of said petition.

4 *Summons.*

The Commonwealth of Kentucky to the Sheriff of Lincoln County:

You are commanded to summon International Harvester Company of America to answer, in 20 days after the service of this summons, a petition filed against it in the Boyle Circuit court by the Commonwealth of Kentucky and warn it that upon its failure to answer, the petition will be taken for confessed, or it will be proceeded against for contempt and you will make due return of this summons within 20 days after the service thereof to the Clerk's office of said Court.

Given under my hand, as Clerk of said Court, this 13th day of Jan'y 1912.

R. G. PRICE, *Clerk.*

Summons is endorsed on back in words and figures, as follows:

Executed by delivering a true copy hereof to J. G. Carlton the agent of the said International Harvester Co.

This the 15" day of January, 1912.

W. L. McCARTY,
Sheriff Lincoln Co.,
By W. S. EMBRY,
Deputy Sheriff.

Petition is endorsed on back in words and figures, as follows:

1912, January 13. Filed in open Court. Summons &
5 copy to Lincoln County issued.

Att: R. G. PRICE, *Clk.*

On the 8th day of April 1912, that being Monday the 1st day of the regular April term of said Court, the following order was made in said action by the Court, and duly entered of record:

Motion to Quash the Sheriff's Return upon the Process.

The defendant by attorney, this day filed herein a written motion entering a special appearance for the purpose to quash the return upon the process issued herein and filed in support of said motion three affidavits.

Motion to quash, return on process is in words and figures, as follows:

Motion to Quash Return on Process.

The International Harvester Company of America, the defendant herein, enters now a special appearance for the purpose of moving to quash the return upon the process issued herein and

purporting to be served upon this defendant by delivering a copy thereof to J. G. Carlton Agent of this defendant. And the defendant, so entering a special appearance and appearing herein under protest, now moves the Court to quash the return upon said process because the defendant says that the said J. G. Carlton was not at the time of the service of said process upon him, and has not since been the agent, of this defendant, nor was he then nor has he since been the president, vice-president, secretary, librarian, cashier,
6 treasurer, clerk, managing agent, chief officer or agent, or manager or person in charge of the business of this defendant, in Boyle County, Kentucky, or at any place in the State of Kentucky or elsewhere; and this defendant was not at the time of the service of said process upon the said J. G. Carlton nor has it since been doing business in the State of Kentucky. And the defendant says that any proceeding taken upon said service would be beyond the jurisdiction of the Court, and that the said Court has no jurisdiction over the person of this defendant by reason of said service; and defendant submits that any proceeding taken by virtue of said service herein will be null and void and will deny to this defendant the equal protection of the laws, and will not be due process of law; and any proceeding taken herein upon said service will be in violation of the law of the State of Kentucky and also in violation of the Constitution of the United States, and particularly the Fourteenth Amendment thereof; and to take any proceeding by virtue of said service would be an interference with and a burden upon Interstate Commerce, in violation of Article 1, Section 8, sub-section 3 of the Constitution of the United States.

Wherefore defendant prays the Court to quash the said process and to proceed no further herein.

The defendant files in support of the above motion the affidavits of J. G. Carlton, J. L. Gardner and Wm. Browning.

A. M. RUTLEDGE &
C. R. McDOWELL,
Att'ys for Def't.

Motion is endorsed on back in words and figures, as
7 follows:

1912, April 8, filed and noted.
Att: R. G. PRICE, *Clk.*

Affidavits filed in support of the motion to quash the process are in words and figures, as follows:

Affidavits Filed in Support of the Motion to Quash the Process.

The affiant, J. G. Carlton, states that he is the person upon whom summons issued in the above entitled action was served as the alleged agent of the defendant, International Harvester Company of America. He states that he is not now, and was not at the time said summons was served upon him, an agent of said Company,

nor was he then, nor has he since been, the President, Vice-president, secretary, librarian, cashier, treasurer, clerk, managing agent, chief officer or agent, or manager or person in charge of the business of defendant, International Harvester Company of America in Boyle County, or in the State of Kentucky, or elsewhere. He states that at the time of the service of said summons upon him, and for some time prior thereto, he was, and continuously since, has been, and now is, employed by the defendant, the International Harvester Company of America as a solicitor, and not otherwise, and that as such solicitor has sole and only authority at the time of said service of process, and for some time prior thereto was, and since then has been, and now is, to solicit proposals for the purchase of goods and machinery owned and held for sale by the defendant, and
8 that such proposals when taken by him had then to be forwarded to the office of the defendant Company outside of the State of Kentucky, to-wit; To the office of the General Agent of said Company located in the City of New Albany, in the State of Indiana, there at its discretion to be accepted or rejected by the defendant at its said office. He states that said proposals so solicited by him were not binding upon the defendant Company until first considered, accepted or rejected by the said Company at its said office outside of the State of Kentucky, and that said proposals and all proposals taken by him, upon their face state that they are not binding upon the defendant Company unless and until they are first accepted by the defendant Company at its said office, which is outside of the State of Kentucky; that at the time of the service of said summons upon him, and for some time prior thereto, he had, and now has no authority to sell any goods, or to contract or be contracted with for or on behalf of the said defendant Company, and no right or authority to exercise any discretion or private judgment in the performance of his duties as such solicitor, or to compromise or adjust any claim due or owing said defendant Company, or any demand against said Company; that at the time of service of said process upon him, he was and for some time prior thereto has been, and now is, only an employee of said de-
9 fendant Company with only the right to solicit proposals which when and if taken were subject to rejection or acceptance by the defendant Company at its discretion outside of the State of Kentucky, as hereinabove stated; that at said time he had, and now has, no right or authority as solicitor to collect notes or other demands due said Company, or to give or execute receipts therefor, although he has on several occasions, under special circumstances and on specific instructions received from the Company, or agents of the Company outside of the State of Kentucky, collected small open accounts due the Company by persons residing in Kentucky; that said accounts so collected by him were paid by checks to the order of the defendant Company and that said checks were by him forwarded to the collecting agent of the defendant Company outside of the State of Kentucky, and receipts therefor were executed and returned by said collecting agent and were not executed by this affiant.

Affiant further states that at the time said summons was served upon him, the defendant, the International Harvester Company of America, was not, nor is it now, doing any business in the County of Boyle or in the State of Kentucky, nor did it then have, nor has it now, any office, officer or agent in said County or State.

J. G. CARLTON.

Subscribed and sworn to by J. G. Carlton, this 14th day of February 1912. My commission expires the 16th day of February 1914.

LOUIS B. WHEELER,

[SEAL.] *Notary Public, —— County, Ky.*

10 Affiant, J. L. Gardner, states that he is the General Agent of the defendant, International Harvester Company of America, with his office as such general agent located in the City of New Albany, State of Indiana, and as such General Agent has, and for several years past has had general charge and supervision of the business and affairs of said defendant with a portion of the State of Kentucky including the County of Boyle. He says that at the time of the service of process herein upon J. G. Carlton, he, the said Carlton, was not, nor since the time of said service of process upon him has he, the said Carlton, been the agent of said defendant Company, nor was he then, nor has he since been, nor is he now, the president, vice-president, secretary, librarian, cashier, treasurer, clerk, managing agent, chief officer or agent, or manager, or agent or person in charge of the business, of the said defendant Company, the International Harvester Company of America in the State of Kentucky, or in Boyle County in said State, or elsewhere. He says that since, upon, and prior to said date of service of process upon him, said Carlton has been, and is now, only an employee of said defendant Company, and nothing more, and that he, the said Carlton is and for some time prior to said service of process upon him, has been employed by the defendant Company only as a solicitor taking written proposals for the purchase of goods belonging to, and held for sale by, the defendant Company; that as such solicitor, said Carlton at the time of the service of said process upon him, and since then has had, and now has, no right or authority in any wise to contract or be contracted with for or on behalf of said defendant Company.

11 Affiant states that the sole and only authority of said Carlton at the time of the service of process upon him, was and since then has been to solicit proposals for the purchase of goods owned and held for sale of the defendant, the International Harvester Company of America, which proposals of purchase are not binding on said Company until and unless forwarded to, and accepted or rejected by said defendant Company through and by this affiant as its General Agent at its said place of business in New Albany, Indiana.

Affiant says that said Carlton has no right to sell any goods for this defendant, nor has he, nor did he have at the time of the serv-

ice of summons upon him herein, authority as such solicitor to collect any notes or obligations due said Company, except to collect upon accounts due said Company when specifically ordered so to do by special instruction from said Company; that he has, and at the time of the service of process upon him herein, and for some time prior thereto had, no authority to bind said defendant Company by any contract whatsoever, nor to compromise in any way any claim or claims due, or demands against, said defendant company, nor the right to use or exercise his private judgment or discretion in any matter or matters connected with the business of the defendant Company or with his duties as such solicitor, nor under his said employment to do anything other than to solicit proposals for the purchase of goods as aforesaid, which proposals when and if taken must be manufactured, any goods, implements or machinery within the State of Kentucky, and that it now has, and since it ceased to do business in said State of Kentucky, as hereinabove stated,
12 the said Company has had, no place or depository for keeping its said goods or machinery anywhere within the State of Kentucky, and that all shipments of goods to purchasers within said State, are now made, and since said Company ceased to do business within said State, have been made, from outside the said State.

JAS. L. GARDNER.

Subscribed and sworn to by J. L. Gardner this 13th day of Feb'y, 1912. My commission expires the 17th day of July 1915.

[SEAL.] MARY E. RICHARDS,
Notary Public in and for Floyd County, Indiana.

William Browning being first duly sworn, deposes and says that he is of lawful age, and a Vice-president of the defendant, and that he is Manager and in charge and control of the business of the defendant, the International Harvester Company of America, in the United States and Canada; that his office as such Vice-President and person in charge and control of the business of the International Harvester Company of America, the defendant, in the United States and Canada, is located in the City of Chicago and State of Illinois; that he has, and has had for several years past, general charge and supervision of all the business and affairs of said Company throughout the United States and Canada.

That said defendant is a private corporation organized under the laws of the State of Wisconsin, and is, and for many years last past has been, engaged solely in the business of selling various agricultural implements and machines.
13

That on or about October 12, 1912, the said International Harvester Company of America revoked all the authority of its agents (theretofore called blockmen), in the State of Kentucky, and confined their duty and authority to that of soliciting salesmen to secure in Kentucky proposals for merchandise and to send such proposals to points outside of the State of Kentucky, there to be accepted and if accepted to be fulfilled by shipping and deliver-

ing such merchandise at points outside the State of Kentucky, and constituting interstate commerce.

Affiant states that on or about the 14th day of October, 1911, pursuant to the directions of its officers and directors, International Harvester Company of America closed all its places of business in Kentucky, shipped all its tangible personal property out of said State, and has not since said time had any place of business or any property in said State except a small amount of property which had been put into the hands of dealers prior to that date and which, prior to January 1, 1912, was disposed of by the International Harvester Company of America to said dealers, and that all of its business with the people of Kentucky since on or about October 14, 1911, has been purely interstate commerce and has been transacted strictly in accordance with the instructions hereinafter set forth.

That on or about October twenty-eighth, 1911, said International Harvester Company of America, pursuant to the directions of its officers and directors, duly revoked the authority of its designated agent in Kentucky, upon whom service of process might
14 theretofore have been made, by filing, in the Office of the Secretary of State, notice of such revocation of authority, and has not since said last named date been doing or transacting any business in the State of Kentucky.

That on the seventh day of November, A. D. 1911, he, as Vice-President and person in charge of all the business and affairs of the defendant in the United States and Canada, sent to all the defendant's General Agents who negotiate any sales to any of the people of Kentucky and who are all located at points outside of said State, the following instructions:

"The Company's transactions hereafter with the people of Kentucky must be on a strictly interstate commerce basis. Travelers negotiating sales must not hereafter have any headquarters or place of business in that state, but may reside there. Their authority must be limited to taking orders, and all orders must be taken subject to the approval of the general agent outside of the state, and all goods must be shipped from outside of the state after the orders have been approved. Travelers do not have authority to make a contract of any kind in the State of Kentucky. They merely take orders to be submitted to the general agent. If any one in Kentucky owes the Company a debt, they may receive the money, or a check, or a draft for the same but they do not have any authority to make any allowance or compromise any disputed claims. When a matter cannot be settled by payment of the amount due, the matter must be submitted to the general or collection agent, as the case may be, for adjustment, and he can give the order as to
15 what allowance or what compromise may be accepted. All contracts of sale must be made f. o. b. from some point outside of Kentucky and the goods become the property of the purchaser when they are delivered to the carrier outside of the state. Notes for the purchase price may be taken and they may be made payable at any bank in Kentucky. All contracts of any and every

kind made with the people of Kentucky must be made outside of that state, and they will be contracts governed by the laws of the various states in which we have general agencies handling interstate business with the people of Kentucky. For example, contracts made by the general agent at Parkersburg, W. Va., will be West Virginia contracts.

"If any one of the Company's general agents deviates from what is stated in this letter, the result will be just the same as if all of them had done so. Anything that is done that places the Company in the position where it can be held as having done business in Kentucky, will not only make the man transacting the business liable to a fine of from one hundred to one thousand dollars for each offense, but it will make the Company liable for doing business in the state without complying with the requirements of the laws of the state. We will, therefore, depend upon you to see that these instructions are strictly carried out."

Affiant further states that since January 1, 1912, and for some time prior thereto, said defendant has not at any time had a place of business in said Boyle County, or elsewhere in the state of Kentucky, nor has there been at any time since said January
16 1, 1912, any officer or agent of said defendant in said county or elsewhere in said State upon whom service of process could be made or was authorized to be made, and that there has not been at any time since said last named date in the State of Kentucky any of the following named officers or agents of said Company, namely, President, Vice-President, Secretary, Librarian, Cashier, Treasurer, Clerk, Managing Agent, Chief Officer or Agent, or Manager, or Agent or person in charge of the business of said defendant, in the State of Kentucky or any agent of any character whatever.

That the only business of any kind transacted or thing done by any employee of said defendant with the people of Kentucky on behalf of said defendant or otherwise, has been to receive proposals for the merchandise of the defendant, subject to the approval of its General Agents outside of said State, which merchandise, after the approval of such proposals, is to be shipped from points without said State, and delivered by the terms of said proposals f. o. b. the cars at points without said State, and the collection of undisputed notes and accounts, and setting up, demonstrating, and repairing for the purchasers, machines shipped and delivered from without the State, under the proposals and contracts above mentioned.

Affiant says that since, and for some time prior to January 1, 1912, all merchandise sold by the International Harvester Company of America to persons in Kentucky has been sold f. o. b. points outside of said State and under contracts which vested title to said merchandise in the purchasers at said point of delivery outside of said State.

17 Affiant says that said setting up, demonstrating, and repairing of said machines are purely incidental to and part of the interstate commerce business of the defendant above set forth, and are in accordance with the long established and uniform

custom of the trade, and are necessary to its success, because, in order to ship the machines the defendant sells in a safe and economical way from points outside of the State of Kentucky to points within said State, the said machines have to be "knocked down," or shipped in parts, and that it is the custom of certain employés of the defendant to assemble the said parts, put the machines together, repair any parts that may be broken by shipment from outside the State, and demonstrate to the person who has already purchased these machines, that they are in good working order and are in accordance with the terms of the contract of sale made outside the State; that these services are rendered at the request of the purchasers, and that the defendant charges nothing for them; that such services are not a part of the Company's business, but purely incidental to the interstate commerce transactions above set forth and are entirely subservient to the contract of sale, vesting in the purchaser the title to the property at the place of delivery outside the State, are no part of said contract and, as above stated, are rendered gratuitously by the International Harvester Company of America. That the only business of the defendant with the people of Kentucky since long prior to said January 1, 1912, has
18 been conducted by said defendant in accordance with the instructions above set forth, and has been wholly interstate commerce, and that said defendant's employés in Kentucky since said October 14, 1911, have at no time had any right or authority to exercise any discretion or enter into any contracts in dealing with the people of Kentucky, but only to receive proposals to be filled in accordance with instructions heretofore set forth.

And further affiant saith not.

WILLIAM BROWNING.

Subscribed and sworn to by William Browning this 20th day of February 1912.

My commission expires the 11th day of November, 1915.

OSCAR LISLE,
Notary Public in and for the County of Cook and State of Illinois.

Affidavits in support of motion to quash return of process is endorsed on back in words and figures, as follows:

1912, Apr. 8th, filed and noted.

Att:

R. G. PRICE, *Clk.*

On the 17th day of April 1912, that being Wednesday, the 19th day of the regular April term of said Court, the following order was made in said action by the Court, and duly entered of record:

Order Filing an Amended Petition.

The plaintiff, by attorney and leave of Court filed herein on this day, an amended petition.

Amended petition is in words and figures, as follows:

19 *Amended Petition.*

Plaintiff amends its petition herein before plea filed and withdraws from its original petition the words, "Within one year before the filing of this petition" where same occur in said petition and adopts as part of this amendment all the allegations of said original petition, as part of this amendment as fully as if set out in words and figures herein except the words, "Within one year before the filing of this petition" and says the acts complained of in said original petition and in this amendment occurred in aforesaid County between April 18th 1911 and the eighteenth day of April 1911, and Twenty-seventy day of October, 1911, and including the Twenty-seventh day of October, 1911, and said period is within one year before the filing of original petition herein and causing a summons to be issued thereon.

Plaintiff prays as in its original petition.

GEO. D. FLORENCE,
Commonwealth's Attorney, Thirteenth Judicial District of Kentucky.

Amended petition is endorsed on back in words and figures as follows:

1912, April 17th, filed in open Court.
Att: R. G. PRICE, *Clk.*

On the 25th day of April 1912, that being Thursday the 16th day of the regular April term of said Court, the following order was made in said action by the Court, and duly entered of
20 record:

Motion to Allow Sheriff to Amend His Return on the Process and Granting Said Motion.

The plaintiff by attorney this day moved the Court to allow the Sheriff, who served the process herein on the defendant to amend his return upon said process so as to conform to the facts which motion the Court granted.

On the 1st day of May 1912, that being Wednesday the 21st day of the regular April term of said Court, the following order was made in said action by the Court, and duly entered of record:

Order Noting the Filing by Sheriff of His Amended Return Upon Process.

This day came the Sheriff of Lincoln County, Kentucky, W. L. McCarty by W. S. Embry deputy Sheriff of said County and filed his amended return on the summons served herein, in conformity to the order of Court heretofore granted herein which amended return is attached to and made a part of the original summons herein.

Affidavit of George D. Florence is in words and figures, as follows:

Affidavit of George D. Florence.

Affiant, George D. Florence, says that he has been since November 28th, 1911, Commonwealth's Attorney for the 13th Judicial District of Kentucky, which District is composed of the Counties of Boyle, Lincoln, Garrard and Mercer; he says that prior to October 28th, 1911, the defendant International Harvester
21 Company of America, was doing business in the State of Kentucky, selling various character- of harvesting machinery and implements, such as is described in the petition, and was between the 18th day of April, 1911, until the 27th of October, 1911, inclusive, selling harvesting machines, implements and repairs as described in the petition and amended petition herein, in Boyle County, and that during said period said J. G. Carlton upon whom process was served in this action, was the chief agent in said County of Boyle, and was known and acted for said defendant during all of said period as its blockman, his duties being to make contracts with local agents in counties in Kentucky, and among the others, the County of Boyle, for the sale in said county of the harvesting machinery, implements and repairs described in the petition and amended petition herein, and to make settlements with said agents for said defendant Company in said county during said period, and to collect money from them for said defendant company, and had general control and supervision of the agents, machinery, repairs and collection, and affairs generally pertaining to the business of said Company in several counties in this state, including the County of Boyle; during said period.

Affiant says that between the 18th day of April 1911, and the 27th day of October, 1911, said defendant, which was during said period and is now a corporation, had on file in the office of the Secretary of State in Frankfort, the name of J. L. Gardner
22 of Louisville, Kentucky, as its agent upon whom process could be served, and that its office named in said statement was located at the Northwest corner of 13th and Maple Streets, Louisville, Kentucky, and said office was so located during the time above mentioned;

Affiant says that on the 28th of October, 1911, the defendant withdrew the name of J. L. Gardner as its agent upon process could be served from the record of the office of the Secretary of State at Frankfort, Kentucky, and revoked on said date the authority of said Gardner as agent upon whom process could be served, and since said time there has not been on file in the office of the Secretary of State at Frankfort, Kentucky, the name of any agent of defendant upon whom process could be served in this state, and since said date October 28th, 1911, said J. L. Gardner has withdrew from the State of Kentucky and has established himself in the City of New Albany, Indiana, at which point he attempts to do business in Kentucky, and from said date up to and including the present time numerous efforts have been made by officers of the

Commonwealth of Kentucky to locate said Gardner in the State of Kentucky, and to serve process upon him in suits against said defendant arising out of causes of action occurring prior to October 28th, 1911 and while said Gardner was the agent of the defendant upon whom process could be served, but said officers of the Commonwealth have never been able to serve process upon said Gardner, although the processes delivered to them were duly authorized processes, and the officers into whose hands said processes came were officers authorized to serve said processes;

23 Affiant says that he is informed, believes and says it is true that since October 28th, 1911, said J. L. Gardner has been evading the service of process upon him in the State of Kentucky, and it has been impossible to serve any process upon him in any action in the State of Kentucky, since said date;

Affiant says that he is informed, believes and says it is true that since the institution of this action, said J. G. Carlton has been acting as agent of defendant in this State, and in Boyle County, and has been the sole agent in Boyle County, authorized to act for or acting for said Company, that said Carlton has been at all times since the institution of this action farming machinery such as are described in the petition and amended petition, for said Company in Boyle County, and during said period been making collection for said Company in said County and attends to any business that said Company may desire him to attend to in said County and as an employed agent defendant during said period — in Boyle County to purchase of defendant machinery and upon such as are described in petition and amended petition, and all of this he has been doing since the 28 day of October, 1911, up to the present time, and was so doing at the time the summons was served on him in this action;

Affiant says he is informed, believes and charges it to be true that the contract made by the agent or agents of said Company in Boyle County, under which some of the sales complained of in the petition and amended petition were made, and some of the contracts which were made by said Company out of which said sales

24 grew, were made by and through said Carlton as agent of said Company, between the 18th day of April, 1911, and the 27th of October, 1911;

Affiant further says that he is informed, believes and charges it to be true that neither the President, Vice-President, Secretary, Cashier, Librarian, Treasurer or Clerk of defendant resides in Kentucky, and that all and each of said above mentioned officers have now and have had since the institution of this action, offices or places of business outside of the State of Kentucky, and none of said officers during said period have come into Kentucky, and affiant says that he is informed, believes and charges it to be true that said J. G. Carlton during the period from April 18th, 1911, to October 27th, 1911, has been the chief officer and agent of defendant in and for Boyle County, Kentucky, and the only officer and agent of defendant in and for Boyle County, Kentucky, who resides in this State, or who has been during said period in Boyle County, Kentucky.

GEO. D. FLORENCE.

Subscribed and sworn to before me by George D. Florence, this the 2nd day of May, 1912.

R. G. PRICE,
Clerk Boyle Circuit Court of Ky.

Affidavit of George D. Florence is endorsed on back in words and figures, as follows:

1912, May 1st, filed in open Court.
Att: R. G. PRICE, *Clk.*

25 On the 1st day of May, 1912, that being Wednesday the 21st day of the regular April term of said Court, the following order was made in said action by the Court, and duly entered of record:

Judgment.

The International Harvester Company of America, the defendant herein, enters now a special appearance for the purpose of moving to quash the return upon the process issued herein, and purporting to be served upon this defendant by delivering a copy thereof to J. G. Carlton, agent of this defendant, and the defendant, so entering a special appearance and appearing here under protest, now moves the court to quash the return upon said process because the defendant says that the said Carlton was not at the time of the service of said process upon him, and has not since been, the agent of this defendant, nor was he then nor has he since been the president, vice-president, secretary, librarian, cashier, treasurer, clerk, managing agent, chief officer or agent, or manager or person in charge of the business of this defendant in Boyle County, Ky., or in any place in the State of Kentucky, or elsewhere; and this defendant was not at the time of the service of said process upon said Carlton, nor has it since been, doing business in the State of Kentucky and the defendant says that any proceeding taken upon said service would be beyond the jurisdiction of the Court, and that the said Court has no jurisdiction over the person of the defendant by reason of said service. And defendant submits that any proceeding taken by virtue of said service herein will be null
26 and void and will deny to this defendant the equal protection of the laws and will not be due process of law, and any proceeding taken herein upon said service will be in violation of the law of the State of Kentucky, and also in violation of the constitution of the United States and particularly the Fourteenth Amendment thereof; and to take any proceeding by virtue of said service would be an interference with and a burden upon interstate commerce in violation of Article 1, Section 8 Subsection 3 of the Constitution of the United States.

Wherefore defendant prays the Court to quash the said process and to proceed no further herein.

The defendant filed in support of the above motion the affidavits of J. L. Gardner, J. G. Carlton and Wm. Browning.

The plaintiff objected to said motion and filed in support of the objections thereto the affidavit of George D. Florence.

It was understood between the parties that the statement in the affidavit of the said Florence, to the effect that J. L. Gardner has established himself in the City of New Albany Indiana at which point he attempts to do business in Kentucky" was based upon the statement of the affidavits filed by defendant. Said motion was submitted upon said affidavits and the Court being advised overruled said motion to which the defendant excepts. The prosecution being called for trial and the defendant failing to appear or plead,

27 it is adjudged guilty by default and its fine is fixed at $500.00. Wherefore it is adjudged by the Court that the defendant, International Harvester Company of America make good to the Commonwealth of Kentucky its fine in the sum of $500.00 (Five Hundred Dollars) and the costs of the prosecution and execution may issue.

And thereupon came the defendant, International Harvester Company of America and moved the Court to set aside the judgment heretofore entered herein adjudging this defendant guilty by default, and fixing its fine at $500.00, because said judgment is and was void and this defendant has not been served with process, and this Court had no jurisdiction over it, to which the plaintiff objected and the Court being advised, overruled said motion and refused to set aside said judgment, to which action of the Court, and all other orders and judgment entered herein the defendant excepts and from all orders and judgments entered herein defendant prays an appeal to the Court of Appeals which is granted upon condition that defendant file the transcript of the record in the office of the Clerk of the Court of Appeals within 60 days.

Supersedeas bond is in words and figures, as follows:

Supersedeas Bond.

INTERNATIONAL HARVESTER CO. OF AMERICA, Appellant,
against
COMMONWEALTH OF KENTUCKY, Appellee.

Upon an Appeal from a Judgment of Boyle Circuit Court Rendered 1st Day of May, 1912.

28 Whereas, Said Appellant International Harvester Co. of America has taken an appeal from the Judgment of Boyle Circuit Court rendered on the 1st day of May 1912, against it in favor of the appellee, for the sum of $500.00 Five Hundred Dollars with 6% interest from May 1st 1912 until paid and its costs herein and the appellant desires to supersede the said judgment above mentioned:

Now, We, International Harvester Company of America by C. R. McDowell, Attorney principal and the Title Guaranty & Surety Co. of Scranton, Pa., by C. R. McDowell attorney in fact surety do hereby covenant to and with the Appellee Commonwealth of Ken-

tucky that the appellant will pay to the Appellee the said fine and judgment and all costs and damages that may be adjudged against the appellant on the Appeal, and also that they will satisfy and perform the said judgment above stated, in case it shall be affirmed and any judgment or order which the Court of Appeals of Ky. may render, or order to be rendered, by the inferior Court not exceeding in amount or value the said judgment aforesaid.

Witness our hands, this 11th day of May, 1912.

INTERNATIONAL HARVESTER COMPANY OF AMERICA,
By C. R. McDOWELL, *Att'y.*
THE TITLE GUARANTY AND SURETY CO. OF SCRANTON, PA.,
By C. R. McDOWELL, *Att'y in Fact.*

Subscribed and acknowledged in my presence and taken and approved by me this May 11, 1912.

Att: R. G. PRICE, *Clk.*

1912, May 11. Supersedeas and copy to Boyle Co., issued.

Att: R. G. PRICE, *Clk.*

Supersedeas is in words and figures, as follows:

29 *Supersedeas.*

I certify that an appeal was granted by the Boyle Circuit Court on the 1st day of May 1912 to the said International Harvester Company of America from a judgment obtained therein against it on the 1st day of May 1912 in favor of the Commonwealth of Kentucky for the sum of $500.00 with 6% interest from May 1912 and its costs herein expended after the bond to supersede said judgment has been executed before me.

Wherefore the Commonwealth of Kentucky, and all others are commanded to stay further proceedings herein.

Witness my hand as Clerk of said Court this 13th day of May 1912.

R. G. PRICE,
Clerk of Boyle Circuit Court.

Clerk's certificate is in words and figures, as follows:

Clerk's Certificate.

I, R. G. Price, Clerk Boyle Circuit Court do certify that the foregoing 41 pages of typewritten matter contain a true full and correct transcript of the entire record in the above styled case.

Given under my hand as Clerk aforesaid this 13 day of May 1912.

R. G. PRICE,
Clerk of Boyle Circuit Court.

30 With the foregoing transcript the appellant filed the following statement of appeal:

Court of Appeals of Kentucky.

INTERNATIONAL HARVESTER COMPANY OF AMERICA, Appellant,
v.
COMMONWEALTH OF KENTUCKY, Appellee.

Statement of Appeal.

The judgment appealed from was rendered by the Boyle Circuit Court at the April Term, 1912, on May 1, 1912, and will be found on pages 35, 36, 37, and 38 of the record.

No warning order is to be made or summons issued, as the appeal was granted by the court below.

The address of Appellee's counsel:

Geo. D. Florence, Stanford, Ky.

James Barnett, Attorney General, Frankfort, Ky.

ARTHUR M. RUTLEDGE,
C. R. McDOWELL,
HUMPHREY & HUMPHREY,
Attorneys for Appellant.

31 Afterwards, to-wit, on the 7th day of June, 1912, at a Court of Appeals held in and for the Commonwealth of Kentucky at the Capitol in Frankfort the following order was entered:

INTERNATIONAL HARVESTER COMPANY OF AMERICA
vs.
COMMONWEALTH.

Boyle.

Came the parties by counsel and filed an agreement and moved the court by consent to advance and submit this case, motion submitted.

Afterwards, to-wit, on the 11th day of June, 1912, at a Court of Appeals held in and for the Commonwealth of Kentucky as aforesaid, the following order was entered:

INTERNATIONAL HARVESTER CO.
vs.
COMMONWEALTH.

Boyle.

The court being sufficiently advised the motion herein is sustained and this case is ordered to be docketed, advanced and submitted.

Afterwards, to-wit, on the 13th day of June, 1912, at a Court of Appeals held in and for the Commonwealth of Kentucky as aforesaid the following orders and judgments were entered herein, to-wit:

Appeal from Boyle Circuit Court.

INTERNATIONAL HARVESTER COMPANY OF AMERICA, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

The court being sufficiently advised it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed and that appellee recover of appellant 10% damages on the amount
32 of the judgment superseded herein. Which is ordered to be certified to said court.

It is further considered that appellee recover of appellant its cost herein expended.

At the same time, to-wit, June 13, 1912, the Court of Appeals of Kentucky delivered the following opinion:

Court of Appeals of Kentucky.

INTERNATIONAL HARVESTER COMPANY OF AMERICA, Appellant,
v.
COMMONWEALTH OF KENTUCKY, Appellee.

Opinion of the Court by Judge Lassing, Affirming.

The same questions are raised upon this appeal that were presented in International Harvester Company v. Commonwealth 147 Ky., 655. In that *the* case the prosecution was by indictment; here, it is by penal action. In each case the offense is charged to have been committed before the appellant withdrew from this State, though the penal action was not brought until after it had done so. The proceedings are identical, in that, in each a fine is sought to be imposed for the violation of a statute.

33 The first ground relied upon for reversal is, that the person, upon whom summons was served, was not an agent of the company, but merely a solicitor for the company, so the company could not be brought before the court on such service. The person, upon whom the process in this case was served, occupied the same relation to the company that the person, upon whom service was had in the Breckenridge county case above referred to, and for the reasons assigned in that case, we now hold that the service was good.

It is next urged that section 3915 Kentucky Statutes, as amended by section 3941-A, Kentucky Statutes, is unconstitutional and violative of the fourteenth amendment to the federal constitution. This

same point was raised in the case of Commonwealth v. International Harvester Co., 131 Ky., 555, and decided adversely to the contention of the company. Again, in International Harvester Co. v. Commonwealth 147 Ky., 655, the validity of these statutes was called in question, and the court asked to recede from the opinion as expressed in Commonwealth v. International Harvester Co., 131 Ky. Upon consideration, the court, adhered to the views as expressed in that case and held the acts valid and not violative of any of the provisions of either the State or federal constitutions. Upon the authority of those cases and for the reasons therein expressed, without elaborating the question here, we hold that the acts are valid and do not violate the fourteenth amendment to the federal constitution.

34 Judgment affirmed.

Humphrey & Humphrey, Louisville, Ky., for appellant. James Garnett, Attorney General, Frankfort, Ky., Carroll & Carroll, Louisville, Ky., T. C. Carroll, Louisville, Ky., Geo. D. Florence, Stanford, Ky., for Appellee.

Afterwards, to-wit, on the 19th day of June, 1912, the appellant and plaintiff in error filed in the office of the Clerk of the Court of Appeals of Kentucky its Assignment of Errors in words and figures following, to-wit:

Supreme Court of the United States.

INTERNATIONAL HARVESTER COMPANY OF AMERICA, Plaintiff in Error,
v.
COMMONWEALTH OF KENTUCKY, Defendant in Error.

35 *Assignment of Errors.*

The International Harvester Company of America, Plaintiff in Error, assigns the following errors which it claims were committed by the Court of Appeals of Kentucky in affirming the judgment of the Circuit Court of Boyle County, Kentucky:

1. The Court erred in holding that the plaintiff in error had been served with process to appear in this cause, by the delivery of a copy of the summons to J. G. Carlton, when it appears from the record that the said Carlton was not such an agent of the plaintiff in error as would justify the service of a process upon the plaintiff in error by delivery of a copy thereof to him; and, therefore, the judgment rendered, based upon said service of process, should have been held to be void; and holding the same valid was a denial to the plaintiff in error of due process of law, and was contrary to the Fourteenth Amendment of the Constitution of the United States.

2. The Court erred in holding that the plaintiff in error had been served with process to appear in this cause, by delivery of a copy of the summons to J. G. Carlton, when it appears from the

record that the plaintiff in error was not, at the time of such service, doing business in Kentucky, and therefore, the judgment rendered based upon said service of process should have been held to be void; and holding the same valid was a denial to the plaintiff in error of the process of law, and a violation of the Fourteenth Amendment to the Constitution of the United States.

3. The Court erred in holding that the plaintiff in error had been served with process in this cause by the delivery of a copy of the summons to J. G. Carlton, when it appears from the record that at the time of such service the plaintiff in error was a cor-
36 poration organized under the laws of the State of Wisconsin, and not a corporation of the State of Kentucky and was carrying on no business in Kentucky, but, so far as Kentucky was concerned, was engaged solely in interstate commerce; and the holding such service valid and sufficient upon which to found a judgment against the plaintiff in error was and is a burden upon and a regulation of interstate commerce, contrary to Article 1, Section 8, sub-section 3 of the Constitution of the United States.

4. The Court erred in holding that the plaintiff in error had been served with process to appear in this cause by the delivery of a copy of the summons to J. G. Carlton, when it appears from the record that the plaintiff in error was, at the time of such service, a corporation of the State of Wisconsin, and not a corporation of the State of Kentucky, and that the said Carlton had no authority from the plaintiff in error to make any contract of any character binding upon it, but it was solely engaged in soliciting orders for the goods of the plaintiff in error, to be accepted and filled beyond the boundaries of the State of Kentucky, and constituting, in their execution, interstate commerce; and, therefore, the judgment rendered, based upon said service of process, should have been held to be void, because holding it valid was and is an interference with and a burden upon interstate commerce, in violation of Article 1, section 8, sub-section 3 of the Constitution of the United States.

5. The Court erred in holding that sub-section 6 of section 51 of the Civil Code of Practice of Kentucky, authorizing the service of process upon the plaintiff in error by the delivery of a copy of the summons to J. G. Carlton, when it appears from the record that the said J. G. Carlton was simply a solicitor of the plaintiff
37 in error, without authority to contract, and when it appears that the plaintiff in error was a corporation organized under the laws of the State of Wisconsin, and not a Kentucky corporation, and was engaged, so far as Kentucky was concerned, solely in interstate commerce, as said sub-section of said section so construed was and is an interference with and a burden upon interstate commerce, in violation of Article 1, section 8, sub-section 3 of the Constitution of the United States.

6. The Court of Appeals further erred in affirming the judgment rendered against the plaintiff in error by said Circuit Court, because the petition upon which such judgment was based did not state a cause of action against the plaintiff in error, because the Anti-trust Act of Kentucky is void for these reasons.

a. To construe the Act of the Legislature of Kentucky, approved March 21, 1906 otherwise than as a repeal of the Act of May 20, 1890, would be violative of the Constitution of the United States, and especially the Fourteenth Amendment thereof, in that it would deny to the plaintiff in error the equal protection of the law.

b. To construe and enforce the Act of May 20, 1890, Section 198 of the Constitution of Kentucky, and the Act of March 21, 1906, so as to make the sale of an article above its real value or below its real value, a penal offense, such value to be determined by a jury upon the trial of the cause, would be violative of the Constitution of the United States and particularly the Fourteenth Amendment thereof, in that this would not be due process of
38 law, and would deny to the plaintiff in error the equal protection of the law.

c. The Statutes of Kentucky under which this action is prosecuted, viz., the Acts of May 20, 1890, and March 21, 1906, as construed and applied by the Court of Appeals of Kentucky, are in conflict with the Constitution of the United States, and particularly with the Fourteenth Amendment thereof, for the following reasons, among others, viz: that the said statutes operate to deny to the plaintiff in error the equal protection of the law, and to deprive the plaintiff in error of its property without due process of law, in that it is denied the right to sell its property at the true value thereof; and, further, in that it is subject to fine if it sells its property at a price which a jury may thereafter determine to be more than the real value thereof, under the uncertain rules engrafted upon said statutes by decisions of the Court of Appeals of Kentucky.

ALEXANDER P. HUMPHREY,
ALEXANDER P. HUMPHREY, JR.,
Attorneys for Plaintiff in Error.

At the same time, to-wit, on June 19, 1912, there was filed in the office of the Clerk of the Court of Appeals the original Writ of Error approved by the Chief Justice of the Court of Appeals of Kentucky, which is attached hereto as follows:

39 THE UNITED STATES OF AMERICA, *ss:*

The president of the United States of America to the Honorable Judges of the Court of Appeals of Kentucky, Greeting:

Because in the record of proceedings, as also in the rendition of the judgment, of a plea which is in the said Court of Appeals of Kentucky, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the International Harvester Company of America, Plaintiff in Error, and The Commonwealth of Kentucky, Defendant in Error, wherein was drawn in question the validity of a statute of, or an authority exercised under, said Commonwealth of Kentucky on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of such validity and manifest error hath happened, to the great dam-

age of said International Harvester Company of America, Plaintiff in Error, as by its complaint appears, we, being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 17 day of July, 1912, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be
40 done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglas White, Chief Justice of the Supreme Court of the United States, this the 18 day of June, 1912, and of the Independence of the United States of America the 136th year.

[Seal United States of America, Eastern K'ty Dist. Court.]

JOHN W. MENZIES,
Clerk United States District Court, Eastern Dist. of Ky., at Frankfort.
By CHAS. N. WIARD,
Deputy Clerk.

Allowed by
J. P. HOBSON,
Chief Justice of the Court of Appeals of Kentucky.

Filed Jun- 19, 1912. Robt. L. Greene, C. C. A.

41 At the same time, to-wit, June 19, 1912, the Plaintiff in Error filed its Bond in the office of the Clerk of the Court of Appeals in words and figures following, to-wit:

Court of Appeals of Kentucky.

INTERNATIONAL HARVESTER COMPANY OF AMERICA, Plaintiff in Error,
v.
COMMONWEALTH OF KENTUCKY, Defendant in Error.

Know all men by these presents: That we, the International Harvester Company as Principal, and the Title Guaranty and Surety Company, as surety, are held and firmly bound unto the Commonwealth of Kentucky in the sum of One thousand — for payment of which well and truly to be made, we, the International Harvester Company of America, Principal, and The Title Guaranty and Surety Company, as surety, bind ourselves jointly and severally firmly by these presents.

Witness our hands and seals this 18th day of June, 1912.

The condition of this obligation is such that whereas the said Commonwealth of Kentucky instituted a certain action against the International Harvester Company of America, claiming a penalty of Five Thousand ($5,000) Dollars, and judgment was rendered accordingly in the Boyle Circuit Court in the sum of Five hundred ($500.00) dollars and subsequently an appeal was taken
42 from said judgment to the Court of Appeals of Kentucky, which affirmed the same; and, whereas, the said International Harvester Company of America has sued out a writ of error from the Supreme Court of the United States to reverse said judgment of the Court of Appeals of Kentucky.

Now, therefore, if the above bounden International Harvester Company of America shall prosecute said writ of error to effect and answer the judgment, all damages and costs, if it fail to make good this appeal, then this obligation shall be void, otherwise to remain in full force and effect.

INTERNATIONAL HARVESTER COMPANY OF AMERICA,
By ALEX. P. HUMPHREY, Jr.
THE TITLE GUARANTY AND SURETY COMPANY,
By ALEX. P. HUMPHREY, Jr.

The above and foregoing bond is approved this June 18 1912.

J. P. HOBSON,
Chief Justice of the Court of Appeals of Kentucky.

Filed Jun- 19, 1912. Robt. L. Greene, C. C. A.

43 Know all men by these presents:

That The Title Guaranty & Surety Company, of Scranton, Pennsylvania, a corporation organized under the laws of the State of Pennsylvania, has made, constituted and appointed, and by these presents does hereby make, constitute and appoint either Alex. P. Humphrey of Alex. P. Humphrey, Jr., its true, sufficient and lawful attorney, with full power and authority to make, execute and deliver, for it, in its name and in its behalf, as surety, a bond or undertaking as follows:—

A bond in the Court of Appeals of Kentucky on behalf of the International Harvester Company of America, being a bond to supersede a judgment of the Court of Appeals of Kentucky rendered against the International Harvester Company of America in re International Harvester Company of America against the Commonwealth of Kentucky, being a bond on appeal from the said judgment to the Supreme Court of the United States, the original judgment in said action having been rendered by the Circuit Court of Boyle County, Kentucky, hereby giving its said attorney full power and authority to do everything whatsoever requisite and necessary to be done for the purpose of making, executing and delivering such

obligation as fully as the officers of said The Title Guaranty & Surety Company, could do if personally present, and hereby ratifying and confirming all that its said attorney shall lawfully do or cause to be done by virtue hereof, but reserving to itself full power of substitution and revocation.

In witness whereof, The Title Guaranty & Surety Company has caused its corporate seal to be hereunto affixed, and these presents to be duly executed by Samuel K. Bland, General Agent,
44 at Louisville, Kentucky, on this 13th day of May, 1912.

THE TITLE GUARANTY & SURETY COMPANY,
By SAMUEL K. BLAND,
[SEAL.] *General Agent at Louisville, Kentucky.*

Filed Jun- 19, 1912. Robt. L. Greene, C. C. A.

At a regular meeting of the Executive Committee of the Board of Directors of The Title Guaranty & Surety Company, of Scranton, Pennsylvania, held at the office of the Company in the City of Scranton, on the Fourth day of April, 1908, the following Resolution was adopted.

"Resolved, That Samuel K. Bland, General Agent of this Company at Louisville, in the State of Kentucky, be and he is authorized and empowered to make, execute and deliver in behalf of the Company, unto such person or persons, in the State of Kentucky, as he may select, its power of attorney constituting and appointing each such person its Attorney-in-Fact, with full power and authority to make, execute and deliver, for it, in its name and in its behalf, as Surety, any particular bond or undertaking that may be required in the State of Kentucky, the nature of such bond or undertaking to be in each case specified in such power of attorney."

STATE OF PENNSYLVANIA,
County of Lackawanna, ss:

45 I, Fred'k K. Tracy, Assistant Secretary of The Title Guaranty & Surety Company, hereby certify that I have compared the foregoing copy of resolution with the original thereof, as recorded in the Minute Book of said Company, and that the same is a correct and true transcript therefrom, and of the whole of said original resolution.

Given under my hand and the seal of the Company at the City of Scranton, Pennsylvania, this 27th day of April, 1908.

FRED'K K. TRACY,
Assistant Secretary.

STATE OF KENTUCKY,
County of Jefferson, ss:

On this day personally appeared before me, a Notary Public in and for the State and County aforesaid, Samuel K. Bland, known

to me to be the General Agent of The Title Guaranty & Surety Company at Louisville in the State of Kentucky, and as such he did thereupon acknowledge and deliver the foregoing instrument of writing as and for the act and deed of The Title Guaranty & Surety Company.

Witness my hand and seal, this 13th day of May, 1912.

[SEAL.] WM. W. GAUNT,
N. P., J. C.

My Notarial Commission will expire Jan. 16th, 1916.

46 On the same day, to-wit, June 19, 1912, there was filed in the office of the Clerk of the Court of Appeals of Kentucky the original Citation with proof of service thereon endorsed, which is attached hereto and returned herewith as follows:

47 UNITED STATES OF AMERICA, *ss:*

To the Commonwealth of Kentucky, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington thirty (30) days after the date hereof, pursuant to a writ of error filed in the Clerk's Office of the Court of Appeals of Kentucky, wherein International Harvester Company of America is Plaintiff in Error, and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the Plaintiff in Error, as in the said Writ of Error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable J. P. Hobson, Chief Justice of the Court of Appeals of Kentucky, this 18 day of June, 1912.

J. P. HOBSON,
Chief Justice of the Court of Appeals of Kentucky.

Citation accepted for the Commonwealth of Kentucky, Defendant in Error, this 18 day of June, 1912.

JAMES GARNETT,
Attorney-General of Kentucky.

48 THE COMMONWEALTH OF KENTUCKY,
The Court of Appeals, Set.:

In obedience to the commands of the attached Writ of Error, I herewith transmit to the Supreme Court of the United States, a complete transcript of the record with all things touching the same in the case of International Harvester Company of America vs. The Commonwealth of Kentucky, on appeal from the Boyle Circuit Court as the same appears from the records and files of my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of my office.

Done at the Capitol in the City of Frankfort, Kentucky on this the 29th day of June, 1912.

[Seal Kentucky Court of Appeals.]

ROBT. L. GREENE,
Clerk of the Court of Appeals of Kentucky.

Fee for this transcript, $16.80.

Endorsed on cover: File No. 23,286. Kentucky Court of Appeals. Term No. 711. International Harvester Company of America, plaintiff in error, vs. The Commonwealth of Kentucky. Filed July 9th, 1912. File No. 23,286.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1913

INTERNATIONAL HARVESTER COMPANY OF AMERICA, *Plaintiff in Error,* v. COMMONWEALTH OF KENTUCKY, *Defendant in Error.*	No. 297. Error to the Court of Appeals of Kentucky. (Breckinridge County)
INTERNATIONAL HARVESTER COMPANY OF AMERICA, *Plaintiff in Error,* v. COMMONWEALTH OF KENTUCKY, *Defendant in Error.*	No. 298. Error to the Court of Appeals of Kentucky. (Boyle County)

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

EDGAR A. BANCROFT,
ALEX. P. HUMPHREY,
Attorneys for Plaintiff in Error.

VICTOR A. REMY,
Of Counsel.

JOHN P. MORTON & COMPANY, INC., LOUISVILLE, KY.

SUBJECT INDEX.

TABLE OF CASES CITED.

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INTERNATIONAL HARVESTER COMPANY OF AMERICA, *Plaintiff in Error,* v. COMMONWEALTH OF KENTUCKY, *Defendant in Error.*	No. 298. Error to the Court of Appeals of Kentucky. (Boyle County)

STATEMENT.

The facts in these cases are not disputed.

The grand jury of Breckinridge County, Kentucky, returned an indictment against the International Harvester Company of America, and upon this indictment, process issued, November 16, 1911, and was executed February 2, 1912, by delivering a true copy of the same to O. L. Pace, called in the return "Chief Officer and Managing Agent of the International Harvester Company of America found in Breckinridge County, Kentucky." (R. 4.)

The indictment was under the anti-trust laws of the State of Kentucky, it being alleged that the International

Harvester Company of America had entered into an unlawful combination and had sold its product at a price above its real value.

A penal action charging a similar offense was filed in the Boyle Circuit Court. Process issued thereon January 13, 1912, and was served on J. G. Carlton, styled in the return "Chief Officer and Managing Agent in the State for the International Harvester Company of America for Boyle County, Kentucky." (R. 2.)

In each of these cases the Harvester Company appeared specially and moved to quash the return. Affidavits were filed and from these it appeared that the Harvester Company was carrying on business in Kentucky up to October 28, 1911; that in pursuance of Section 571, Ky. Stat., it had designated Louisville, Kentucky, as its principal place of business, and J. L. Gardner as its agent upon whom process could be served. This section of the statutes is given in the Appendix.

It further appeared that on October 28, 1911, the Harvester Company had revoked the agency of Gardner and had not appointed any other agent upon whom process might be served; that at that time it ceased to transact any business in Kentucky other than the solicitation by its agents—Pace for Breckinridge County and Carlton for Boyle County—these agents having no authority other than that usually reposed in traveling salesmen; that is to say, these persons had no right to make any sale or contract of sale for the Harvester Company. It further appeared that the Company had no property in Kentucky but, having a warehouse at New Albany, Indiana, sold its products f. o. b. at that place.

As we understand the opinion of the Court of Appeals of Kentucky, it concedes the existence of these facts

and we do not understand them to be disputed. This will appear from various parts of the opinion of the Court of Appeals in the Breckinridge County case (R. 24), and from the opinion of the Court of Appeals in the Boyle County case (R. 18), where it is simply said that the person upon whom process in that case was served "occupied the same relation to that company as the person upon whom service was had in the Breckinridge County case above referred to." The opinion in the Breckinridge County case is reported, *International Harvester Company* v. *Commonwealth*, 147 Ky. 655, and the opinion in the Boyle County case, *International Harvester Company* v. *Commonwealth*, 149 Ky. 41.

The ground of this motion to quash was, that the Harvester Company was not carrying on any business in the State of Kentucky which would justify the service of process upon any agent of the Harvester Company in that State; and that there was no agent in that State except these traveling salesmen. The Harvester Company claimed that to sustain this process would be a denial of due process of law and hence a violation of the Fourteenth Amendment. It also claimed that it would be a burden on Interstate Commerce, and hence a violation of the Commerce Clause of the Constitution.

In each instance the circuit court overruled the motion to quash, and thereupon judgment was taken by default.

In Kentucky there is a provision in the Code of Practice to the following effect:

> "Section 763. Neither a void judgment nor a judgment against a defendant who shall have been only constructively summoned and shall not have appeared in the action * * * shall be reversed or modified by the Court of Appeals until a

motion to set aside or modify the judgment shall have been made in the inferior court and overruled."

Accordingly such a motion was made in each case and was overruled. Thereupon the Harvester Company appealed the case to the Court of Appeals of Kentucky; and in each instance that court affirmed the judgment. From these judgments writs of error were sued out to this court and they are now here for its determination.

ASSIGNMENT OF ERRORS.

The assignment of errors in the Breckinridge County case is as follows (R. 36):

1. The court erred in holding that the plaintiff in error had been served with process to appear in this cause, by the delivery of a copy of the summons to O. L. Pace, when it appears from the record that the said Pace was not such an agent of the plaintiff in error as would justify the service of a process upon the plaintiff in error by delivery of a copy thereof to him; and, therefore, the judgment rendered, based upon said service of process, should have been held to be void; and holding the same valid was a denial to the plaintiff in error of due process of law, and was contrary to the Fourteenth Amendment of the Constitution of the United States.

2. The court erred in holding that the plaintiff in error had been served with process to appear in this cause, by delivery of a copy of the summons to O. L. Pace, when it appears from the record that the plaintiff in error was not, at the time of such service, doing business in Kentucky, and, therefore, the judgment rendered, based upon said service of process, should have been held to be void; and holding the

same valid was a denial to the plaintiff in error of due process of law, and a violation of the Fourteenth Amendment to the Constitution of the United States.

3. The court erred in holding that the plaintiff in error had been served with process in this cause by the delivery of a copy of the summons to O. L. Pace, when it appears from the record that at the time of such service the plaintiff in error was a corporation organized under the laws of the State of Wisconsin, and not a corporation of the State of Kentucky, and was carrying on no business in Kentucky, but, so far as Kentucky was concerned, was engaged solely in interstate commerce; and the holding such service valid and sufficient upon which to found a judgment against the plaintiff in error was and is a burden upon and a regulation of interstate commerce, contrary to Article 1, Section 8, Subsection 3, of the Constitution of the United States.

4. The court erred in holding that the plaintiff in error had been served with process to appear in this cause by the delivery of a copy of the summons to O. L. Pace, when it appears from the record that the plaintiff in error was, at the time of such service, a corporation of the State of Wisconsin, and not a corporation of the State of Kentucky, and that the said Pace had no authority from the plaintiff in error to make any contract of any character binding upon it, but was solely engaged in soliciting orders for the goods of the plaintiff in error, to be accepted and filled beyond the boundaries of the State of Kentucky, and constituting, in their execution, interstate commerce; and therefore, the judgment rendered, based upon said service of process, should have been held to be void, because holding it valid was and is an interference with and a burden upon interstate commerce, in violation of Article 1, Section 8, Subsection 3, of the Constitution of the United States.

5. The court erred in holding that Subsection 6 of Section 51 of the Civil Code of Practice of Kentucky, authorized the service of process upon the plaintiff in error by the delivery of a copy of the summons to O. L. Pace, when it appears from the record that the said O. L. Pace was simply a solicitor of the plaintiff

in error, without authority to contract, and when it appears that the plaintiff in error was a corporation organized under the laws of the State of Wisconsin, and not a Kentucky corporation, and was engaged, so far as Kentucky was concerned, solely in interstate commerce, as said subsect on of said section so construed was and is an interference with and a burden upon interstate commerce, in violation of Article 1, Section 8, Subsection 3 of the Constitution of the United States.

6. The Court of Appeals further erred in affirming the judgment rendered against the plaintiff in error by said circuit court, because the petition upon which such judgment was based did not state a cause of action against the plaintiff in error, because the anti-trust act of Kentucky is void for these reasons:

(a) To construe the Act of the Legislature of Kentucky approved March 21, 1906, otherwise than as a repeal of the Act of May 20, 1890, would be violative of the Constitution of the United States, and especially the Fourteenth Amendment thereof, in that it would deny to the plaintiff in error the equal protection of the law.

(b) To construe and enforce the Act of May 20, 1890, Section 198 of the Constitution of Kentucky, and the Act of March 21, 1906, so as to make the sale of an article above its real value, or below its real value, a penal offense, such value to be determined by a jury upon the trial of the cause, would be violative of the Constitution of the United States and particularly the Fourteenth Amendment thereof, in that this would not be due process of law, and would deny to the plaintiff in error the equal protection of the law.

(c) The Statutes of Kentucky under which this action is prosecuted, viz., the acts of May 20, 1890, and March 21, 1906, as construed and applied by the Court of Appeals of Kentucky, are in conflict with the Constitution of the United States, and particularly with the Fourteenth Amendment thereof, for the following reasons, among others, viz: that the said statutes operate to deny to the plaintiff in error the equal protection of the law, and to deprive

the plaintiff in error of its property without due process of law, in that it is denied the right to sell its property at the true value thereof; and, further, in that it is subject to fine if it sells its property at a price which a jury may thereafter determine to be more than the real value thereof, under the uncertain rules engrafted upon said statutes by decisions of the Court of Appeals of Kentucky.

Similar assignments were made in the Boyle County case (R. 19).

ARGUMENT.

In Kentucky, where a special appearance is entered and motion made to quash a process, if this motion is overruled the defendant can plead to the merits. If the judgment goes against the defendant he can appeal to the Court of Appeals. That court will consider, first, the action of the court of first instance in passing upon the motion to quash the process. If the court finds this action of the lower court was erroneous it will not further look into the record, but will reverse the judgment without regard to whether the court has committed any error in the trial of the case on the merits. Taking an appeal, however, enters the appearance of the defendant for the purpose of another trial.

This practice is fully stated in the case of *Chesapeake, Ohio & S. W. R. R. Co.* v. *Heath*, 87 Ky. 651, and will not, we suppose, be disputed.

If, therefore, the Court of Appeals of Kentucky erroneously determined the Federal question, it will belong to this court to reverse the judgment of the Court of Appeals of Kentucky with directions to set aside the judgment by default and to remand the case to the court of first instance for a trial on the merits.

In discussing the instant cases in the Court of Appeals of Kentucky, two distinct questions were argued:

First, whether this process was sufficiently served under the law of the State of Kentucky; that is, whether the two persons upon whom process was served in these cases were such persons as the Civil Code of Practice designated as having a sufficient agency to receive, on behalf of the Harvester Company, a summons. This

question is, obviously, one upon which the decision of the Court of Appeals is binding upon this court, and we shall therefore omit any discussion of it in the course of this argument.

The second question, however, is one upon which we have the right to ask the judgment of this court.

The question is, whether, under the circumstances in this case, the Harvester Company was carrying on business in the State of Kentucky in such a way as to justify the courts of that State in taking jurisdiction of complaints made against the Harvester Company by service of process upon an employe of the Harvester Company who was simply soliciting business for that company, such business being exclusively interstate in its character.

Service of Process Upon Foreign Corporations as Controlled by the Constitution of the United States.

Whatever might be the decision of this case if the Harvester Company, at the time the process was served, had been carrying on business in the State of Kentucky, additional and different considerations must govern when it appears that at that time it was not carrying on business in this State.

By Section 571 of the Kentucky Statutes (vide Appendix) it is provided that all corporations except foreign insurance companies, formed under the laws of this or any other State "and carrying on any business in this State," shall at all times have one or more known places of business "in this State," and an authorized agent or agents thereat upon whom process can be served. The statute then proceeds to prohibit a corporation from carrying on any business "in this State" until it shall have

filed in the office of the Secretary of State a statement duly signed, giving the location of its office "in this State" and the name of its agent upon whom process can be served.

A number of cases have been decided by the Court of Appeals of Kentucky on indictments for penal actions against foreign corporations failing to comply with the above section.

In *Commonwealth* v. *Hogan & Co.*, 74 S. W. 737, 25 K. L. R. 41, there was a suit against a foreign corporation to recover a penalty under this section for engaging in business in Kentucky without giving the location of its office. It appeared that all the defendant did was to sell shoes in Kentucky by a traveling salesman, who was permitted to solicit and forward from retail merchants doing business in Nelson County, from samples exhibited to them, orders addressed to the defendant at a point outside of the State. These orders were subject to the approval of the defendant at its place of business, and if approved were filled by shipment from its factory in the State of Indiana, to Nelson County, Kentucky. It was held that there was no obligation upon this corporation to comply with Section 571. The court said:

> "No question seems to be more firmly settled than that a manufacturer of goods which are unquestionably subjects of commerce, who carries on his business of manufacturing in one State, can send his agents into another State to solicit orders for the product of the manufactory without being embarrassed or obstructed by being required to take out licenses, establish resident agencies, or file certificates, by the laws of the domestic State. This subject is so exhaustively treated in Brennan v. Titusville, 153 U. S. 289, as to render citation of further authorities unnecessary. These decisions rest upon the theory that orders taken for goods by

> traveling salesmen in the employ of foreign corporations do not constitute the contract itself, and that the contract has existence only from the time of the confirmation of the order."

In *Commonwealth* v. *Eclipse Hay Press Co.*, 31 K. L. R. 824, 104 S. W. 224, it appeared that there was a proceeding similar to the one mentioned in the last case, taken against the defendant. The court said:

> "The appellee is a corporation created by the laws of Missouri and is engaged in the business of manufacturing and selling hay presses. The evidence shows that the only business it conducted in Kentucky was to employ agents here to solicit orders, which were forwarded to the appellee at Kansas City, Missouri, for approval by the principal. If the order was approved the presses were shipped from Missouri to the consumer, or to the agent for the consumer. The business done by the appellee was interstate commerce, and it is now too well settled to be questioned that a State may not impose regulations upon interstate commerce, this being, under the Constitution of the United States, exclusively within the province of Congress."

In *Three States Buggy Co.* v. *Commonwealth*, 105 S. W. 971, 32 K. L. R. 385, it appeared that an Illinois company furnished goods to a Kentucky dealer, deliverable f. o. b. Cairo, Illinois. There was an agreement that the vendee might return such goods as were found to be unsalable. His place of business was Bardwell, Kentucky. It was held that the appellant was not carrying on business in Kentucky within the contemplation of Section 571.

It would therefore seem to be clear, under the cases decided by the Kentucky court prior to its decision in this case, that the Harvester Company, at the time process was served upon it, was not doing business in Kentucky, within the meaning of Section 571.

The proposition that in order to obtain a personal judgment against a foreign corporation by process served upon any one, the corporation must be doing business in the State, is laid down in many cases in the Supreme Court of the United States.

In *Goldey* v. *Morning News*, 156 U. S. 518, it was held that a suit could not be maintained in New York against a Connecticut corporation by service of process upon the president of the Connecticut corporation who happened casually to be in the State of New York.

This case has been followed and amplified many times. Thus in *Conley* v. *Mathieson*, 190 U. S. 406, it appeared that suit was brought in the State of New York against the defendant, which was incorporated in the State of West Virginia, and that the defendant had designated no agent upon whom process could be served. Summons was served upon R. T. Wilson and John W. Agar, two members of the Board of Directors of the corporation, both residents of the State of New York. It appeared that defendant had been carrying on business in New York and while there had entered into a contract with the plaintiff for his employment as general superintendent, for a term of eight years. Subsequent to this date the defendant had sold all of its property in New York and moved its place of business to Rhode Island. The court held that the principle announced in *Goldey* v. *Morning News* covered the case at bar; that a corporation, in order to be sued in a State foreign to its incorporation, must be doing business there.

In *Caledonian Co.* v. *Baker*, 196 U. S. 432, the syllabus is as follows:

> "Service of summons in an action in a territorial court of New Mexico, on the president of a railway

corporation while passing through New Mexico as a passenger on a railroad train, held insufficient as a personal service of a corporation organized under an Act of Congress, having offices in New York, Kansas, and Illinois, and none in New Mexico; the mere ownership of lands, the bringing of suits to protect such lands in New Mexico, does not locate the corporation in New Mexico for the purposes of a personal action against it based on such a service of the summons, nor was such service authorized by the Compiled Laws of New Mexico, 1897."

In *Remington* v. *Central Pacific R. Co.*, 198 U. S. 95, there was a suit brought in the State of New York, summons being served on a director of the defendant, a foreign corporation. The court said:

> "The circuit court was warranted by the affidavits before it in finding that the defendant was doing no business and had no property in the State of New York, and that the service on a director casually within the State for a few days, was bad."

In *Kendall* v. *American Automatic Loom Co.*, 198 U. S. 477, a suit by a plaintiff in New York against a West Virginia corporation, on service upon its treasurer, the court said:

> "Regarding the case as properly here, the question is whether the service made upon the treasurer of the appellee corporation was a valid service upon the corporation itself. We think it was not. It is perfectly apparent that the corporation was, at the time of the service on the treasurer, doing no business whatever within the State of New York, and that it had never done any business there since it was incorporated in the State of West Virginia. While we have lately held that in the case of a foreign corporation the service upon a resident director of the State where the service was made was a good service, where that corporation was doing business within that State, *Pennsylvania Lumbermen's Co.* v. *Meyer*, 197 U. S. 407, yet such service is insuf-

ficent for a court to acquire jurisdiction over the corporation where the company was not doing any business in the State and was situated like this company at the time of the service upon the treasurer."

In *Peterson* v. *C. R. I. & P.*, 205 U. S. 364, it is said:

> "It is settled by the decisions of this court that foreign corporations can be served with process within the State only when doing business therein, and such service must be upon an agent who represents the corporation in its business."

The same doctrine is laid down in *Green* v. *C. B. & Q.*, 205 U. S. 530. That was a case brought in Philadelphia against a railroad whose lines began at Chicago and ran west. The company had an office in Philadelphia, with clerks who solicited business for it, both freight and passenger. It was held that a suit could not be maintained in Pennsylvania by service on such agents, as the company was not doing business in Pennsylvania.

The same doctrine is again applied in *Mechanical Appliance Co.* v. *Castleman*, 215 U. S. 437.

A recent well-considered case on this subject is *Saxony Mills* v. *Wagner & Co.*, 94 Miss. 233, 47 Southern, 899. In that case a suit was brought against a non-resident corporation and service was had upon one T. L. Reynolds, a resident of Mississippi, who was at the time a traveling salesman in the employment of the defendant. The court quoted the law of 1894, which provided:

> "If the defendant in any suit or legal proceeding be a corporation, process may be served on the president or other head of the corporation, upon the cashier, secretary, treasurer, clerk, or agent of the corporation, or upon any one of the directors of such corporation."

After adverting to a certain clause of the statute relating to railroad, sleeping-car and other such corporations, the court said:

"But the appellant corporation does not fall within this class. It has no office or place of business in the State of Mississippi. It has its place of business elsewhere, and sends its traveling salesmen into this State, who take orders, which are transmitted to the home office and filled by shipment direct to the purchaser. The question is whether a court acquires jurisdiction of a case against such a non-resident corporation by serving process upon a traveling salesman. Is such an employe an 'agent' of the corporation within the meaning of the statute above quoted? It is well settled that a corporation like the appellant company can not be held to be 'doing business' within the State, in the absence of a statute enlarging the usual significance of this well-known expression. It is hardly necessary to cite authority in support of this conclusion, as there is no intelligent dissent among the authorities. See the exhaustive note to *Berger* v. *Pennsylvania R. R. Co.* (R. I.), 9 L. R. A. (N. S.) 1214.

"It is equally well settled that, in the case of a corporation which is not 'doing business' in this State, service of process upon a mere soliciting agent is not sufficient. Such an employe is not an agent of the corporation within the meaning of the statute. It is accurately stated by the Michigan court that the word 'agent' in a statute like ours does not mean every man who is intrusted with a commission or employment, but designates the principal officers of the corporation, who either generally or in respect to some particular department of the corporate business have a controlling authority, either general or special. *Lake Shore & Michigan Southern Ry. Co.* v. *Hunt*, 39 Mich. 469. It is said again that statutes providing for service of process upon an 'agent' of a corporation are to be construed 'to include only agents vested with some general authority and discretion, and not to extend to mere employes having no independent powers.' 19 Ency. Pl. & Pr. 676; *Fairbanks* v. *Cincinnati & C. R. Co.*, 54 Fed. 420, 4 C. C. A. 403, 38 L. R. A. 271.

"It follows from these views that the justice's court was wholly without jurisdiction to render the original judgment, and the same is absolutely void. Such being the case, the writ of garnishment against

the Newburger Mercantile Company should have been quashed."

An excellent case, not only because it is written by a judge who is of evident ability, but because of its review of other cases on the subject, is that of *Fawkes* v. *American Motor Car Sales Co.*, 176 F. R. 1010. The matter is there thoroughly examined and the facts of three cases are given which bear out the proposition that a corporation is not doing business in a State where it sends into that State, or has in that State, persons to make sales of its product, such sales being subject to confirmation at the office of the company. We give the following long extract from the opinion of the court because it seems to us to be pertinent from beginning to end:

> "Three cases were cited in the argument which upon the facts above stated must control the decision of this motion. One was decided in the Supreme Court of the United States (*Green* v. *Chicago, Burlington & Quincy Railway Co.*, 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916), another was decided in the Supreme Court of the State of Minnesota (*North Wisconsin Cattle Co.* v. *Oregon Short Line R. R. Co. et al.*, 105 Minn. 198, 117 N. W. 391), and the third was decided in this court (*Boardman* v. *S. S. McClure Co.*, 123 Fed. 614).
>
> "In the first case—*Green* v. *C., B. & Q. Ry. Co.*—the defendant employed one Harry E. Heller and hired an office for him in Philadelphia, designating him as district freight and passenger agent. His business was to solicit and procure passengers and freight to be transported over the defendant's lines, which did not extend east of Chicago. In conducting this business several clerks and various traveling passenger and freight agents were employed. He sold no tickets and received no payments for transportation of freight. Occasionally he sold to railroad employes who already had tickets over intermediate lines orders for reduced rates over

the defendant's lines. In some cases, for the convenience of shippers who had received bills of lading from the initial line for goods routed over the defendant's lines, he gave in exchange therefor bills of lading over the defendant's lines. That action was brought by the plaintiff, a citizen of Philadelphia, in the Circuit Court of the United States for the Eastern District of Pennsylvania, and service was made upon Heller in Philadelphia. The court said:

" 'It is obvious that the defendant was doing there a considerable business of a certain kind, although there was no carriage of freight or passengers. * * * The business shown in this case was, in substance, nothing more than that of solicitation. Without undertaking to formulate any general rule defining what transactions will constitute "doing business" in the sense that liability to service is incurred, we think that this is not enough to bring the defendant within the district so that process can be served upon it.'

"In the second case, the one from Minnesota, it appeared that D. M. Collins and H. F. Carter were in the employ of the defendant the Union Pacific Railroad Company, and that it maintained a permanent office in the city of Minneapolis for their use, and hired to assist them some other employes. Collins and Carter were engaged in influencing shippers of freight and prospective passengers to use the lines of the Union Pacific Railroad Company, no part of which extended into Minnesota. They did not make contracts with shippers or passengers, but secured results, if at all, by inducing such passengers and shippers to route goods or buy tickets over the Union Pacific lines. The business done by them was fairly described as soliciting business for and advertising their employer. In carrying on this business, the company maintained in Minnesota a permanent office on a fairly extensive scale. The service of the summons was made upon the Union Pacific Company by delivering a copy to Collins in Minneapolis. The court said:

" 'We have, then, the question whether upon the ultimate facts herein stated the summons was duly served upon the defendant within the meaning of our statute (R. L. 1905, Sec. 4109, subd. 3), which reads as follows: "If the defendant be a foreign

corporation, the summons may be served by delivering a copy to any of its officers or agents within the State. * * * The statute does not require in express terms that the foreign corporation must be doing business within the State in order to justify the service of a summons against it upon its agent; but this is necessarily implied, for it could not be represented within the State by an agent unless it was doing business therein. * * * The statute, however, does not define the character of the business, the doing of which in the State will subject it to the process of the court by service on its agents. It simply provides that service may be made upon the agents of the corporation. Therefore a foreign corporation sending its agents into this State impliedly consents that, if they do for it any acts which constitute doing business within the State, as that term is defined by its court, process against it may be served on such agents. The solicitation of passenger and freight traffic in the State is not within that term. We accordingly hold that the facts of this case do not justify the conclusion that the respondents herein were, or either of them, doing business within this State, so as to authorize the service of the summons upon their soliciting agent.' "

"The last case, the one from this court, was decided by Judge Lochren. In that case the defendant, a New York corporation, was in the business of publishing books and other publications, including periodicals, and including a magazine known as 'McClure's.' It circulated its magazines in Minnesota by mail from New York. In its magazine business the advertising receipts were twice its circulation receipts. It did a large advertising business in Minnesota, which it obtained there through its traveling solicitors, and especially through Little, the man upon whom service in this case was made. Little traveled through the Western States, including Minnesota, working up advertising business for the magazine, and soliciting and taking orders for advertising. He could only quote rates as fixed by the home office, and his orders as to space and copy were subject to the approval of the home office. He could not make definite contracts, but took orders and submitted them to the defendant.

"Referring to the Minnesota statute relating to

the service of process upon foreign corporations, the court said:

" 'I think it would be going too far to hold that under this statute a jobbing corporation who has traveling men sent through the country to solicit orders for goods or wares can be held, under a statute like this, to be doing business wherever those solicitors go, and that it is liable to be served with process by delivering copies of the process to such traveling men going about the country. They would not be transacting the general business of the corporations, which would be to sell goods, either goods that they were dealing in or goods that they were manufacturing. * * * It does not seem to me that it is transacting business in Minnesota simply by having solicitors for advertisements here, and that appears to have been the extent of Mr. Little's business. The testimony of those who are presumed to have knowledge on the subject, of Mr. Little himself, and of Mr. Brady is that he had no authority to make contracts, even for advertisements, but simply to solicit orders, to procure persons to forward proposed advertisements to the company, or perhaps he took the proposed advertisements, and forwarded them himself, and that from the rates which are made public in the magazine, or in instructions which he had he could assure the persons of whom he solicited advertisements in respect to the rates, and what would be charged for the advertisements if they were inserted, but he did not make definite contracts. The name which such person assumes, even with the knowledge of his principal, will not be controlling, when the real character of his employment appears. I think it was entirely like the employment of ordinary traveling men or runners, who doubtless are able to name the prices of goods for which they seek orders, although they may not be able to make definite contracts that all these orders will be supplied. The dealer may not have the goods to supply them, and may be unable to fill the order, nor required to do it.' * * *

"The facts in the case at bar bring it within the three decisions first above cited. Bowman had no authority to make any contracts for the sale of any

automobiles. His powers were limited to soliciting orders and submitting them to the defendant at its office either in Toledo or Indianapolis, and the definite agreement was there made."

At the Time of the Attempted Service the Defendant was Doing Nothing but an Interstate Commerce Business with the People of Kentucky.

The record stands undisputed that when service of process was attempted in this case, the defendant owned and maintained no offices in Kentucky, had no place of business there, had no property in the State, stored no goods in the State, and made no sales whatever within the borders of the State. The sole business of any nature transacted by the defendant with the people of Kentucky consisted in:

(a) The soliciting of orders within the State of Kentucky, which orders, after being obtained, had to be approved by an agent of defendant outside of the State before there was any contract.

(b) The shipping of the goods f. o. b. a point outside of Kentucky, pursuant to the orders solicited and obtained within the State, to the purchaser.

(c) The collection of accounts, notes, etc.

It has been so often held that the collection of accounts within a State is not doing business in such State, that this phase of defendant's activities need not be further noticed. Of course, if collecting accounts in a State were doing business in the State, then any foreign corporation sending an account to an attorney or bank, to collect, would be doing business there. *Commonwealth v. Chattanooga Company*, 126 Ky. 636, is directly in point on this proposition.

The soliciting of orders and the shipping of the goods

on such orders constitute interstate commerce pure and simple.

In *Brennan* v. *Titusville*, 153 U. S. 289, 38 L. Ed. 719, 722, a city ordinance imposed a tax which the Supreme Court of Pennsylvania held applied to agents soliciting in the State of Pennsylvania for orders for products manufactured outside of the State and shipped, pursuant to such orders, within the State. The facts as stated by the court were as follows:

> "1. J. A. Shephard is a manufacturer of picture frames and maker of portraits, residing in Chicago, in the State of Illinois, of which State he is a citizen and in which city he has his manufactory and place of business.
>
> "2. In the prosecution of said business he employs agents who, under his direction, solicit orders for pictures and picture frames in the State of Pennsylvania and in other States of the Union, by going personally to residents and citizens of said State of Pennsylvania and other States and exhibiting samples of his pictures and frames, going, when necessary, from house to house in said State of Pennsylvania and other States.
>
> "3. The defendant, J. W. Brennan, was an agent of the said J. A. Shephard, employed by him to travel and solicit orders for said pictures and frames in the manner stated, upon a salary and also upon commission upon the amount of his sales, at the time of his arrest, May 25, 1889, upon a warrant issued by the authorities of the city of Titusville, in the State of Pennsylvania."

The court held the ordinance unconstitutional, as an interference with interstate commerce.

The defendant in this case is doing in Kentucky precisely what Shephard, in the case above cited, was doing in Pennsylvania.

Caldwell v. *North Carolina*, 187 U. S. 621, 47 L. Ed. 336, 341, is similar to that of *Brennan* v. *Titusville*, ex-

cept that in the Caldwell case the goods were shipped by a Chicago company to itself in Greensboro, N. C., where the defendant, as a soliciting agent of the Chicago company, received them, carried them to a room, opened the boxes, took out the pictures and picture frames, assorted them, put them together and delivered them to the purchasers in the city of Greensboro. This distinction from the Brennan case induced the Supreme Court of North Carolina to hold that the Chicago Portrait Company was engaged in business in North Carolina, and, therefore, that the defendant, Caldwell, its soliciting agent, was liable for the city tax. The court, in holding that the reasoning of the Supreme Court of North Carolina was faulty, that the transaction was interstate commerce, and that the rule laid down in *Brennan* v. *Titusville* applied, said:

> "We are not persuaded by this reasoning. It seems to proceed upon two propositions: First, that the pictures in question were not completed before they were brought to Greensboro; and, second, that the articles were not shipped directly to the purchasers, but to an agent of the senders in Greensboro.
>
> "But it certainly can not be pretended that, if the pictures and the disconnected frames had been directly shipped to the purchasers, the license tax could have been imposed, either on the vendor out of the State, or on the purchaser within the State. If the pictures and the frames intended for them had been shipped directly to the purchasers, whether in the same or separate packages, such a transaction would, beyond question, be interstate commerce beyond the reach of the taxing power of the State. It is too plain for argument that the supposed incomplete condition of articles of commerce, if shipped directly to the purchasers, can not subject them to the license tax.
>
> "But we are not disposed to concede that, under

the facts of this case, the pictures were, in any proper sense, incomplete when received in Greensboro. That the frames and the pictures were in separate packages, if such was the case, was merely for convenience in packing and handling, and 'placing the pictures in their proper places' (the language of the verdict) meant that each picture was placed in the frame designed for it. The selection of the frame was as much a part of the purchase and sale as the selection of the picture.

"Nor does the fact that these articles were not shipped separately and directly to each individual purchaser, but were sent to an agent of the vendor at Greensboro, who delivered them to the purchaser, deprive the transaction of its character as interstate commerce. It was only that the vendor used two instead of one agency in the delivery. It would seem evident that, if the vendor had sent the articles by an express company, which should collect on delivery, such a mode of delivery would not have subjected the transaction to State taxation. The same could be said if the vendor himself, or by a personal agent, had carried and delivered the goods to the purchaser. That the articles were sent as freight by rail, and were received at the railroad station by an agent who delivered them to the respective purchasers, in no wise changes the character of the commerce as interstate."

Under the authorities, therefore, it is clear that the business of the defendant with the people of Kentucky is solely an interstate commerce business.

The Carrying on of Interstate Commerce by the Defendant with Persons Residing in this State Does Not Constitute a Doing of Business in Kentucky.

What constitutes such a carrying on of business in a State as to render a foreign corporation subject to suit there? It is carrying on the same identical business which would render a corporation liable for failure to

appoint a statutory agent, under Section 571 of the Kentucky Statutes. (Ky. Stats. 1909.) Obviously, this is so, because the very purpose of the statutory provision is to provide an easy method for service on all corporations doing business in Kentucky—in other words, on all foreign corporations which could lawfully be sued there.

Unless, therefore, the defendant could be compelled to appoint a statutory agent, the judgment below must be reversed on the ground that the defendant is not doing business in Kentucky and can not be served with process.

But laws providing for the appointment of statutory agents do not and can not apply to foreign corporations engaged solely in interstate commerce.

> *Commonwealth* v. *Hogan Co.*, 25 K. L. R. 41, 74 S. W. 737, 738.
> *Commonwealth* v. *Eclipse Hay Press Co.*, 31 K. L. R. 824, 104 S. W. 224.

In *Havens & Geddes Co.* v. *Diamond*, 93 Ill. App. 557, 564, defendants pleaded that appellant was a foreign corporation and had failed to designate an agent in Illinois, and, therefore, could not maintain an action in the courts of that State. The evidence showed that appellant sent traveling salesman into Illinois with sample trunks, who called on retail merchants and solicited orders for goods. These orders would be transmitted to the head office of the company at Indianapolis, where they would be accepted, if satisfactory, and goods packed and shipped on board cars at Indianapolis, consigned to the purchaser. In reversing the judgment of the lower court, holding that the Illinois statute which provided that any corporation doing business in Illinois must designate an agent in that State or else could not sue in the courts of that State, the Appellate Court said:

> "To construe our statute to include these transactions as doing business within this State would make it violate the provisions of the Constitution of the United States, which grants to Congress power to regulate commerce among the several States."

Many cases might be cited on this point, but we believe the foregoing decisions clearly illustrate the principle.

Merely Soliciting Orders is Not Doing Business in a State.

We have heretofore cited the case of *Green* v. *C., B. & Q. Ry. Co.*, 205 U. S. 530, which fully sustains this proposition. The case of *North Wisconsin Cattle Co.* v. *Oregon Short Line R. Co., et al.*, 105 Minn. 198, 117 N. W. 391, 392 is also in point.

The foregoing decisions were cited and followed in *Fawkes* v. *American Motor Car Sales Co.*, 176 Fed. 1010, 1012, from which we have made liberal extracts.

Other cases to the same effect are:

Earle v. *Chesapeake & Ohio Ry. Co.*, 127 Fed. 235, 240.
N. K. Fairbank & Co. v. *Cincinnati, N. O. & T. P. Ry. Co.*, 54 Fed. 420, 423.

In *Grace* v. *Martin Brick Machinery Mfg. Co.*, 174 Fed. 131, 132, the Circuit Court of Appeals (Seventh Circuit) held that the Illinois statute authorizing service of process upon an agent of a foreign corporation doing business in Illinois, did not justify service upon a traveling salesman having authority to solicit orders for goods, to be submitted to the company for approval, because in such case the company was not doing business in Illinois.

The above cases, we submit, are directly in point.

The Court of Appeals of Kentucky held the service of

process valid under Section 51, subdivisions 3 and 6. These subdivisions are as follows:

> Section 3. In an action against a private corporation the summons may be served, in any county, upon the defendant's chief officer, or agent, who may be found in this State; or it may be served in the county wherein the action is brought upon the defendant's chief officer or agent who may be found therein; or if the defendant operate a railroad, it may be served upon the defendant's passenger or freight agent stationed at or nearest to the county seat of the county in which the action is brought.
>
> Section 6. In actions against an individual residing in another State, or a partnership, association, or joint stock company, the members of which reside in another State, engaged in business in this State, the summons may be served on the manager, or agent of, or person in charge of, such business in this State, in the county where the business is carried on, or in the county where the cause of action occurred.

Subsection 6 is in terms confined to those therein mentioned, who are non-residents of the Commonwealth but are carrying on business in the Commonwealth. Subsection 3 does not expressly contain any language confining it to those corporations which are doing business in the State. But the cases of *Saxony Mills* v. *Wagner & Co.*, 94 Miss. 233, 47 Southern, 899, and *North Wisconsin Cattle Company* v. *Oregon Short Line*, 105 Minn. 198, 117 N. W. 391, both expressly decide the proposition that this limitation is implied. This will appear from the extract given directly from the decision in the Mississippi case, and from the extract given from the Minnesota case in our quotation from the case of *Fawkes* v. *American Motor Car Co.*, 176 Fed. 1011.

To Hold that Defendant Can be Prosecuted in these Cases Would Violate the Commerce Clause of the United States Constitution.

The defendant, as the evidence shows, has withdrawn from Kentucky and now is carrying on solely an interstate commerce business with the people of that State.

Had the defendant not only left the State, but refused to do an interstate commerce business with residents of Kentucky, obviously, these actions could never have been prosecuted to judgment, because the defendant would have had no employe at all in the State upon whom service of process could be attempted. The employe who was served is necessary for the carrying on of interstate commerce by the defendant. To hold this service good casts a burden on defendant's interstate commerce business, because if such be the holding, it can not transact such business without being subject to suit in Kentucky.

That is to say, if no service had been attempted, clearly this case would never have been brought to trial, nor would any fine have been imposed. Service was attempted solely because an employe of the defendant, engaged in facilitating the interstate commerce business which the defendant is doing, was found there. Therefore, if this judgment be sustained, the defendant is in a worse position, owing solely to the fact that it is engaged in interstate commerce with the people of Kentucky, than it would be had it left the State and refused to ship any of its goods there. A burden thus is thrown on its commerce, contrary to Section 8 of Article I of the United States Constitution.

Obviously, a State can not prosecute a defendant for carrying on an interstate commerce business. This was

held in *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 27, 44 L. Ed. 657, 663.

In *Hadley-Dean Co.* v. *Highland Glass Co.*, 143 Fed. 242, 244, the contract sued on was for the sale of glass manufactured in Pennsylvania, to be delivered to the vendee in Missouri. As a defense to this action, the anti-trust statute of Missouri was pleaded. The Circuit Court of Appeals for the Eighth Circuit said:

> "Of the State statute it is sufficient to say that it can have no application to the contract under consideration without impinging upon the exclusive authority of Congress to regulate commerce among the several States."

In *Albertype Co.* v. *Gust Feist Co.*, 102 Tex. 219, 114 S. W. 791, 792, the Albertype Company, a New York corporation, sold, through a traveling salesman, by sample, certain albums. In the sales contract the Albertype Company agreed to sell no other albums in Galveston for a year. This provision clearly was contrary to the Texas anti-trust law, and the lower court held, upon that ground, that plaintiff could not sue. In reversing, the Supreme Court said:

> "The transaction under consideration was commerce between a citizen of New York and a citizen of Texas, whereby the former agreed to manufacture the albums in New York and to deliver them at Galveston, Texas. Therefore, it was interstate commerce, which was not subject to the anti-trust laws of this State."

To similar effect are:

Eclipse Paint & Mfg. Co. v. *New Process Roofing & Supply Co.*, 55 Tex. Civ. App. 553, 120 S. W. 532, 533.

Moroney Hdw. Co. v. *Goodwin Pottery Co.* (Tex. Civ. App.), 120 S. W. 1088, 1091.

We do not contend that the above authorities are on all fours, because in those cases the effort was to apply the State anti-trust laws to interstate commerce transactions. We insist, however, that the principle laid down in those cases and in others cited in this brief, applies here, namely: that where a defendant carries on solely an interstate commerce business, it can not, because of doing such a business, be placed by a State in any worse position than if it shipped no goods whatsoever into the State.

Suppose the defendant were enjoined by this court from doing business in Kentucky. In such event, obviously, the carrying on of an interstate commerce business by it would not and could not violate the injunction.

Waters-Pierce Oil Co. v. *Texas,* 177 U. S. 27, 44 L. Ed. 657, 663.

Similarly here, the defendant can not be served unless it is doing business in Kentucky; and to hold that purely interstate commerce business renders it liable to service in prosecutions for alleged past violation of the anti-trust laws of this State necessarily burdens such interstate commerce business. This is clear, because, were the defendant transacting neither an interstate commerce nor an intrastate business, it could not be served. The defendant does no intrastate business, and, therefore, the service is based wholly on the fact that defendant does an interstate business.

The Fact that the Harvester Company Formerly Carried on Business in Kentucky Does Not Alter the Situation.

It is true that at one time the Harvester Company did carry on business in Kentucky and did have an agent

there upon whom process could be served. However, it canceled the authority of this agent and withdrew from the State. This being its present status we can not perceive how its former status is at all relevant to the controversy.

There can be no doubt of the right of the Harvester Company to revoke the authority of an agent appointed by it under Section 571. There is nothing in this section that makes such an agency a continuing one. But, besides this, the designated agent was not served with process.

While it is true that so long as the Harvester Company was doing business in Kentucky the courts of that State were not confined to taking jurisdiction upon service of process upon the designated agent, yet the fact that the Company had such designated agent in no way enlarged the authority of the courts of Kentucky to take jurisdiction upon process served upon some other agent. In the instant case the authority of the agent has been canceled. The fact that Gardner was once an agent in no way increases the authority of an officer in serving a process.

At last the question comes to this: was the Harvester Company in Kentucky for the purpose of jurisdiction of its courts at the time service was made upon Carlton and Pace?

We cannot understand how the situation of the Harvester Company is in any way different from that of some other foreign corporation which shall begin now for the first time to send its soliciting agents into that State.

In *Conley* v. *Mathieson Alkali Works*, 190 U. S. 406, suit was brought in New York and process served upon two directors of the corporate defendant—a method of

service allowed by the statutes of that State. The suit was upon a contract made in New York, and the corporate defendant had at one time carried on business there. At the time the suit was brought, however, it was not carrying on business in that State. The result of the decision was to make immaterial the fact that the contract sued on was made in New York, and that the corporate defendant had formerly carried on business in New York.

There are, undoubtedly, certain cases holding that when an insurance company obtains a license to do business within a State and, as a condition of obtaining such license, agrees that process may be served upon a designated State officer—say Commissioner of Insurance, this authority cannot be withdrawn so long as there are outstanding unfulfilled contracts. But there is nothing of this kind in the case at bar, and these authorities are in a class by themselves.

That the decision in this case must have a far-reaching consequence will be obvious from the consideration of the method of transacting business common to corporations in the United States. We suppose there is no railroad company of any considerable size which does not have soliciting agents for freight, or for passengers and freight, in practically every State in the Union. Mercantile corporations, big and little, send their "drummers" all over the country. If the Court of Appeals is right in this case, then each of these corporations becomes subject to suit in transitory actions whenever one of these employes crosses the State line.

The learned court, in its decision in the Breckinridge County case, seemed to regard the whole problem as solved by a reference to what was said by this court in the case of *International Text Book Co.* v. *Pigg*, 217 U. S.

91. Undoubtedly, this court did say in that case that the International Text Book Company was doing business in Kansas; but that is also true of the various other corporations who have been adjudged not to be carrying on business in such a way as to give to the States, foreign to their origin, jurisdiction.

In *St. Louis S. W. R'y* v. *Alexander,* 227 U. S., at page 226, this court said:

> "In this class of cases, where it is undertaken to hold a corporation personally liable in a foreign jurisdiction, two questions ordinarily arise: the first, was the corporation within the jurisdiction in which it is sued? the second, was process duly served upon an authorized agent of the corporation? As to the latter question, there is little difficulty in this case. The cause of action having accrued in New York by the failure to keep the contract for the safe delivery of the goods there, the service could be properly made under the New York statute, in the absence of other designated officials, upon the resident director. Pennsylvania Lumbermen's Mutual Fire Insurance Company v. Meyer, 197 U. S. 407.
>
> "The other question as to the presence of the corporation within the jurisdiction of the court in which it was sued raises more difficulty. A long line of decisions in this court has established that in order to render a corporation amenable to service of process in a foreign jurisdiction it must appear that the corporation is transacting business in that district to such an extent as to subject it to the jurisdiction and laws thereof. (Omitting citations.)
>
> "In the court below it was adjudged that the so-called Carmack Amendment, under the circumstances here detailed, had had the effect of making the corporation liable to suit in New York and, because of the agency within New York of the connecting carrier, effected by that statute, must be held to be there present and subject to service of process. In view of the recent consideration of the Carmack Amendment in this court it is unnecessary to now enter upon any extended discussion of it. The object of

> the statute was to require the initial carrier receiving freight for transportation in interstate commerce to obligate itself to carry to the point of destination, using the lines of connecting carriers as its agencies, thus securing for the benefit of the shipper unity of transportation and responsibility. Atlantic Coast Line R. R. Co. v. Riverside Mills, 219 U. S. p. 203. The provisions of the amendents had the effect of facilitating the remedy of the shipper by making the initial carrier responsible for the entire carriage, but the amendment was not intended, as we view it, to make foreign corporations through connecting carriers liable to suit in a district where they were not carrying on business in the sense which has heretofore been held necessary to confer jurisdiction."

And it is to be noted that in the above extract are the following phrases:

> "Transacting business in that district to such an extent as to subject it to the jurisdiction and laws thereof."
>
> "Carrying on business in the sense which has heretofore been held necessary to confer jurisdiction."

It may well be that sending a traveling solicitor into a State, or keeping a soliciting agent in a State, may be regarded as doing business in that State. But that does not meet the question; for at last the question is this: If a foreign corporation shall send into a State not of its origin an agent whose sole duty and authority shall be to solicit business for the corporation, does that fact, in and of itself, confer upon the courts of that State the right to have process served upon such agent and to maintain jurisdiction of any transitory action which may be brought against the foreign corporation?

We respectfully submit that it does not, and that, in the instant case, the judgment of the Court of Appeals of

Kentucky in each of these cases should be reversed and the cause remanded, with proper instructions as to the further disposition thereof.

It will be noted that besides the error which we insist was committed by the learned Court of Appeals in upholding this process, we have also assigned as error the upholding by that court of the constitutionality of the anti-trust laws of the State of Kentucky. The constitutionality of these laws is fully argued in other cases now pending in this court, and we have no desire to add anything to what has been said therein.

Of course, if these statutes are unconstitutional then the Court of Appeals of Kentucky should have reversed the judgments in these two cases on the merits, because neither the indictment nor the penal action constituted any cause of action.

Respectfully submitted,

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VICTOR A. REMY,
Of Counsel.

APPENDIX.

Section 571, Kentucky Statutes.

All corporations except foreign insurance companies formed under the laws of this or any other State, and carrying on any business in this State, shall at all times have one or more known places of business in this State, and an authorized agent or agents thereat, upon whom process can be served; and it shall not be lawful for any corporation to carry on any business in this State, until it shall have filed in the office of the Secretary of State a statement, signed by its president or secretary, giving the location of its office or offices in this State, and the name or names of its agent or agents thereat upon whom process can be served; and when any change is made in the location of its office or offices, or in its agent or agents, it shall at once file with the Secretary of State a statement of such change; and the former agent shall remain agent for the purpose of service until statement of appointment of the new agent is filed; and if any corporation fails to comply with the requirements of this section, such corporation, and any agent or employe of such corporation, who shall transact, carry on or conduct any business in this State, for it, shall be severally guilty of a misdemeanor, and fined not less than one hundred nor more than one thousand dollars for each offense.

SUBJECT INDEX AND AUTHORITIES.

International Text Book Co. v. Pigg, 217 U. S., 91.
Delamater v. South Dakota, 125 U. S., 93.
19th Cyc, 1347-1348.

To hold that plaintiff in error was properly served with process and the judgment rendered against it valid will not violate the commerce clause of the United States Constitution 45
International Harvester Co. of America vs. Commonwealth, 147 Ky., 657.

TABLE OF CASES AND STATUTES CITED.

In the Supreme Court of the United States

OCTOBER TERM, A. D. 1913.

INTERNATIONAL HARVESTER COMPANY OF AMERICA, - - - - - - - *Plaintiff in Error.*

v. No. 297.

COMMONWEALTH OF KENTUCKY (Breckinridge County) - - - - - Defendant in Error.

(*Error to the Court of Appeals of Kentucky*)

INTERNATIONAL HARVESTER COMPANY OF AMERICA, - - - - - - - *Plaintiff in Error.*

v.

COMMONWEALTH OF KENTUCKY (Boyle County), - - - - - - - *Defendant in Error.*

(*Error to the Court of Appeals of Kentucky*)

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

The Grand Jury of Breckinridge County, Kentucky, returned on the 14th day of October, 1911, an indictment against the International Harvester Company of America, charging it with having in Breckinridge County, Kentucky, within one year before the finding of the indictment (October 14, 1911,) entered into a pool, trust,

* * * and understanding with certain other machine companies for the purpose of selling in Breckinridge County harvesting and farm machinery controlled by them, and to enhance the cost of said machinery above its real value, and that in pursuance of said pool, trust and understanding, did enhance the price of said machines above their real value and offered same for sale in said county within one year before the finding of the indictment. The indictment will be found on pages one and two of Transcript of Record.

In the Boyle County case a penal action was instituted by the Commonwealth of Kentucky against the International Harvester Company of America on January 13, 1912, in which it was charged that the defendant, in Boyle County, within one year before the filing of the petition in Boyle County, committed the same offense against the laws of Kentucky as is charged in the Breckinridge County indictment. On the 17th day of April, 1912, an amended petition was filed by the Commonwealth in which it withdrew the words in original petition "within one year before the filing of this petition," and says the acts complained of in said original petition and in the amendment, occurred in Boyle County between the 18th of April, 1911, and the 27th day of October, 1911. The original petition in the Boyle County case will be found in Transcript of Boyle County Record on pages one and two, and the amended petition will be found on page 11.

So the Breckinridge County indictment and the Boyle County petition charge that in Breckinridge County within a year prior to October 14, 1911, and in Boyle County within a year prior to October 27, 1911, the defendant violated certain laws of the State of Kentucky. We deem it material that those dates be remembered. In the Breckinridge County case a summons was issued on the indictment, as was also a summons upon the petition in the Boyle County case, the Breckinridge summons being directed to the Sheriff of Breckinridge County, and

the Boyle summons to the Sheriff of Lincoln County. The Breckinridge summons was returned with the following endorsement thereon:

> "Executed the within summons by delivering a true copy of the same to O. L. Pace, Chief Officer and managing agent of the International Harvester Company of America found in Breckinridge County, Kentucky, its President and Vice President, secretary, librarian, cashier, treasurer and clerk, being absent from said County, February 2, 1912.
>
> "DENNIE SHEERAN, S. B. C.,
> By A. T. Beard, D. S."

The summons to Lincoln County was returned with the following endorsement thereon: (Page 2 of Boyle Transcript of Record.)

> "Executed the within summons by delivering a true copy of the same to J. G. Carlton, chief officer and managing agent in the State for the International Harvester Company of America for Boyle County, Kentucky, its president, vice president, secretary, librarian, cashier, treasurer and clerk being absent from Boyle County, and said International Harvester Company of America, having no officer, or agent in or for Boyle County who may be found therein.
>
> "W. L. MCCARTY, Sheriff of Lincoln Co., Ky.
> "By W. S. Embry, D. S."

both being in accordance with the laws of Kentucky.

To the Breckinridge County indictment and the Boyle County petition the defendant (plaintiff in error) here entered its appearance specially and moved to quash the return in each case, and the motion in each case was overruled. The defendant then in each case declined to plead further and in accordance with the law of Kentucky, a judgment was entered in each case against the defendant (plaintiff in error) for the sum of five hundred

($500.00) dollars. From those judgments an appeal was prosecuted to the Court of Appeals of Kentucky, and that court, on the 10th day of April, 1912, affirmed the judgment of the Breckinridge Circuit Court, and the same court, on the 13th of June, 1912, affirmed the judgment of the Boyle Circuit Court. From the judgment of affirmance by the Court of Appeals of Kentucky the defendant (plaintiff in error) prosecuted an appeal by writ of error to this court.

Various questions were raised in argument in the Court of Appeals of Kentucky attacking the jurisdiction of the Breckinridge and Boyle Circuit Courts by plaintiff in error (defendant therein) and the Federal questions raised on this appeal were also argued before the Court of Appeals of Kentucky. The opinion of that court upon the various questions raised will be found on pages 24 to 35 of Breckinridge Transcript of Record, and it answers so fully and discusses so thoroughly the various questions raised that we deem it proper to here insert it in full:

> At the October Term, 1911, of the Breckinridge Circuit Court, the Grand Jury returned an indictment against the International Harvester Company of America, under section 3915 of the Kentucky Statutes, as amended March 26, 1906, charging it with being a member of a pool, trust or combination with other companies, for the purpose of regulating and controlling the price of harvesting machinery and to enhance the cost thereof above its reasonable value.
>
> Process having issued upon the indictment, it was executed in the manner indicated by the return thereon, which reads as follows:
>
> "Executed the within summons by delivering a true copy of the same to O. L. Pace, chief officer and managing agent of the International Harvester Company of America found in Breckinridge County, Kentucky, its president and vice president, secretary,

librarian, cashier, treasurer and clerk, being absent from said county, February 2, 1912.

"DENNIS SHEERAN, S. B. C.
"By A. T. BEARD, D. S."

On February 14, 1912, the appellant entered a special appearance for that purpose only, and moved the court to quash the return upon the process, upon the grounds recited in the motion, that it was a Wisconsin corporation; that it was not carrying on any business in Kentucky at the time the process was served; that O. L. Pace was not its officer or agent of any description; that to proceed upon said service would be in violation of the law of Kentucky, and of the Fourteenth amendment to the Constitution of the United States, because it did not constitute due process of law; and also that it was in violation of the interstate commerce clause of the Federal Constitution.

Upon the hearing of the motion, appellant read the affidavits of O. L. Pace, J. L. Gardner and William Browning; while the Commonwealth read the affidavits of J. R. Layman and C. M. Schupp, with certain exhibits, and introduced M. D. Beard, who testified orally. The proof upon the part of the Harvester Company shows, in substance, that it was carrying on business in Kentucky in the usual way, until sometime in October, 1911; and, pursuant to section 571 of the Kentucky Statutes, it had appointed J. L. Gardner as its agent upon whom process could be served; that it had ceased to do business in Kentucky, and had not done business therein since sometime prior to November 1, 1911; that on October 28, 1911, it had revoked the authority of Gardner to receive process for it, by filing a formal revocation in the office of the Secretary of State; that Pace, the person upon whom the process was served, had formerly been employed by the appellant as a "blockman," with authority to transact certain business for the Harvester Company in Kentucky; that prior to November 1, 1911, the Harvester Company had removed all of its property and business office from the state of Kentucky to New Albany,

Ind., and had revoked the authority of all its agents, including Pace; that since that time its only transaction with the people of Kentucky had been the soliciting of proposals for its harvesting machines by means of traveling solicitors, Pace being one of them; that these traveling solicitors had no authority to bind the company in any way, but they merely took orders from proposed customers, and that these orders were of no validity until accepted by the company at a point outside of the State, and when so accepted the goods thus sold were shipped to Kentucky from a point outside of the State, where the title passed to the purchaser. The proof upon the part of the Commonwealth shows that the Harvester Company had moved out of the State in order to avoid the prosecution of indictments and penal actions against it; that some of the particular acts complained of in the indictment and the business so transacted, was done by and through said Pace as agent for said company; that Gardner had endeavored to avoid service of process upon him, which had issued out of the Hardin Circuit Court upon an indictment or penal action there pending; that one Beard had a commission contract with the Harvester Company which expired on September 1, 1911, and that he having left in his hands certain machinery belonging to the Harvester Company, and which he had not sold, Bondurant, an agent of the Harvester Company had a settlement with him for this machinery in November, 1911, under which Beard purchased the machinery and gave his note payable to the order of the Harvester Company, for the purchase price.

The circuit judge overruled appellant's motion to quash the return upon the process, and the appellant having failed to appear or plead, was fined $500 the lowest penalty prescribed by the statute for the offense charged in the indictment. Subsequently, the Harvester Company moved to set aside this judgment, upon the ground that it was a void judgment; and this motion having been overruled, the Harvester Company appeals to this court for a reversal.

The only question involved, therefore, is whether there was such a service of process upon the Harvester Company that would sustain the judgment rendered.

Under section 147 of the Kentucky Code of Practice in Criminal Cases, the summons in criminal cases must be served in the same manner as a summons in civil cases.

Subsection 3 of section 51 of the Civil Code of Practice provides for the service of process in an action against a private corporation, as follows:

"In an action against a private corporation the summons may be served, in any county, upon the defendant's chief officer, or agent, who may be found in this State; or it may be served in the county wherein the action is brought upon the defendant's chief officer, or agent who may be found therein."

Subsection 6 of said section 51, reads as follows:

"In actions against an individual residing in another State, or a partnership, association, or joint stock company, the members of which reside in another State, engaged in business in this State, the summons may be served on the manager, or agent of, or person in charge of, such business in this State, in the county where the business is carried on, or in the county where the cause of action occurred."

Section 732 of the Civil Code of Practice, providing for the construction of the Code, declares that unless a different intention be expressed, or be shown by the context, the following rule, among others, shall prevail:

"The chief officer or agent of a corporation which has any of the officers or agent herein mentioned is: First, its president; second, its vice president; third, its secretary or librarian; fourth, its cashier or agent; fifth, its clerk; sixth, its managing agent."

It is first contended that the service is insufficient under subsection 6 of section 51, above quoted, because that section does not specifically include corporation within its terms.

Section 208 of the Constitution, however, provides:

"The word corporation, as used in this Constitution, shall embrace joint stock companies and associations."

And, pursuant to this constitutional provision, section 457 of the Kentucky Statutes, regulating the construction of statutes, provides:

"The word 'corporation,' 'company,' may be construed as including any corporation, company, person, persons, partnership, joint stock company or association."

In construing these provisions in Adams Express Company v. Schofield, 111 Ky., 832, it was held that the words "corporation" and "company," should be so construed as to include any corporation, company, person, persons, partnership, joint stock company or association, thus making the terms "corporation" and "association" synonymous within the meaning of these statutory provisions for the service of process.

It seems reasonably clear, therefore, that appellant, although it be a corporation, is equally within the scope and meaning of subsection 6 of section 51 of the Code.

It is not necessary to inquire whether the sheriff's return is in proper form, since it may be amended if the record shows that the proper person was served. Nelson Morris & Co. v. Rehkopf & Sons, 25 Ky. Law Rep., 352, 75 S. W., 203; Cumberland v. Lewis, 32 Ky. Law Rep., 1300.

The real question, therefore, is this: Was Pace an agent, under subsection 3, or under subsection 6 of section 51, above quoted, that process served upon Pace will sustain a judgment against appellant? Was the Harvester Company engaged in business in the State of Kentucky, and was Pace its agent in charge of such business at the time the summons was served upon him? If these questions are to be answered in the affirmative, the service is admittedly good, and the judgment a valid one.

The Code provision above referred to was passed upon and upheld by this court, under vary-

ing states of fact, in Boyd Commission Co. v. Coates, 24 Ky. Law Rep., 730, 69 S. W., 1091; Nelson Morris & Co. v. E. Rehkopf & Sons, 25 Ky. Law Rep., 352, 75 S. W., 203; Guenther v. American Steel Hoop Co., 116 Ky., 580; Wortham v. The Illinois Life Insurance Co., 32 Ky. Law Rep., 827, 107 S. W., 176; Johnson v. Westerfield's Admr., 143 Ky., 10, and in other cases.

A trading corporation is personally present for the purpose of jurisdiction whenever it has established a place of trade. The difficulty arises in determining what amounts to the establishment of a place of trade.

In Chattanooga N. B. & L. A. v. Denson, 189 U. S., 408, the granting of a loan by a Tennessee Building and Loan Association to a citizen of Alabama upon the latter's signed application, solicited by a traveling agent of the association, and taking a note and mortgage executed in Alabama as security for the loan, constituted a doing of business in Alabama, regardless of the form and terms of the note and mortgage.

The general rule is thus stated in 19 Cyc., 1327:

"The distinction is clearly this: If the foreign corporation confines its operations to the State within which it was created, it can not be sued in a State where it has no office and transacts no business, by serving process on its president or other officer or agent when accidentally present within such State. Such officer or agent does not represent the corporation, or carry with him his official or representative character into a State where the corporation has done no business and has not established any office. But when a foreign corporation sends its officers into another State, and does business there, it is liable to be brought into the courts of such State by a service of process upon such officers, so acting for it, and a judgment founded upon such service will be good everywhere."

Perhaps the best general discussion of this subject is to be found in Mr. Justice Field's opinion in St. Clair v. Cox, 106 U. S., 350. In the course of that opinion Justice Field said:

"It is sufficient to observe that we are of opinion that when service is made within the State upon an agent of a foreign corporation, it is essential, in order to support the jurisdiction of the court to render a personal judgment, that it should appear somewhere in the record—either in the application for the writ, or accompanying its service, or in the pleadings or the finding of the court—that the corporation was engaged in business in the State."

And, in construing the statutes of Michigan, which are, in effect, substantially the same as ours, he said:

"Her statutes expressly provide for suits being brought by them in her courts; and for suits by attachment being brought against them in favor of residents of the State. And in these attachments suits they authorize the service of a copy of the writ of attachment, with a copy of the inventory of the property attached, on 'any officer, member, clerk, or agent of such corporation' within the State, and give to a personal service of a copy of the writ and of the inventory on one of these persons the force and effect of personal service of a summons on a defendant in suits commenced by summons.

"It thus seems that a writ of foreign attachment in that State is made to serve a double purpose, as a command to the officer to attach property of the corporation, and as a summons to the latter to appear in the suit. We do not, however, understand the laws as authorizing the service of a copy of the writ, as a summons, upon an agent of a foreign corporation, unless the corporation be engaged in business in the State, and the agent be appointed to act there. We so construe the words 'agent of such corporation within this State.' They do not sanction service upon an officer or agent of the corporation who resides in another State, and is only casually in the State, and not charged with any business of the corporation there."

In reviewing this question in the late case of the Good Roads Machinery Co. v. Commonwealth, 146 Ky., 692, we said:

"In Nelson Morris & Co. v. E. Rehkopf & Sons, 75 S. W., 203, 25 Ky. Law Rep., 352, a broker living in Paducah wired to Nelson Morris & Co., of Chicago, asking their price on hides. The broker was supplied with a quotation, and with this quotation before him sold the hides to Messrs. Rehkopf & Sons at Paducah. He forwarded the order to Nelson Morris & Co., who accepted it and filled it. Suit was brought against Nelson Morris Co., by Rehkopf & Sons, the summons issuing upon the petition being served upon the broker, Bransford Clark, under subsection 6, of section 51, of the Civil Code. The service was upheld by this court; but the opinion was specific in remarking that Bransford Clark was the agent 'as to this transaction,' and further pointed out that the action arose 'out of this transaction.'"

"In Wortham, et al. v. Illinois Life Insurance Co., 107 S. W., 176, 32 Ky. Law Rep., 827, Mr. Leslie M. Rue, an insurance man of Harrodsburg, in conjunction with an insurance man from Louisville, insured the life of Mrs. Wortham in a company not regularly represented by either of them. Mr. Rue had a commission upon this business. He collected the first three premiums due on the policy. Mrs. Wortham did not pay the fourth premium and died shortly after its due date. Action was brought upon the policy by the beneficiaries named in it. Their claim was that the policy was in force, notwithstanding the failure to pay the premium, because of her alternative right to extended insurance, provided for in the policy, as she had given notice to the company, through Mr. Rue, of her desire to use her accumulations for that particular purpose. This court held that the testimony above outlined about this transaction was sufficient to take the case to the jury upon the question of Rue's agency, as to this matter.

"In Boyd Commission Co. v. Coates, 69 S. W., 1091, one R. L. Carter was the Clinton, Kentucky correspondent of the Boyd Commission Co., a brokerage concern of St. Louis. The Commission

Company had a private wire into Carter's office, for which he paid them rental. He would transmit over this wire orders obtained by him for the purchase of stocks of various kinds, for which he charged one-fourth of one per cent. commission on all deals made with his customers. The company bought these stocks on the market and divided the commission with Carter. The Commission Company paid all losess incurred on these deals and appropriated all the profits except the commission paid to Carter. In an action arising out of one of these particular transactions service was had upon Carter, under subsection 6, of section 51, Civil Code. The court held that Carter was the agent, and sustained the service. It will be noted that Carter was acting regularly from day to day with a private wire between his own office and that of his principal.

"In Johnson v. Wuesterfield's Admr., 143 Ky., 10 the service was had upon an Indiana owner of a steamboat doing business in Kentucky, by service upon the captain and master of the boat in Kentucky. This court upheld the service, saying that the captain 'had entire and complete charge, not only of Johnson's business in Kentucky, but of the particular business that had caused the injury which was the subject of the action.' "

This is not the case of a single business transaction performed within the State by some agent other than Pace, but it is a case where all or the principal part of the business that appellant does in the State is managed by and in charge of Pace.

The question is not to be controlled by the extent of the agent's authority, but by the extent and scope of the business done and the agent's connection therewith. As was pertinently said in Good Roads Machinery Co. v. Commonwealth, 146 Ky., 695:

"It is not the presence or absence of a specific contract of agency or a specific execution of a commission of agency, but the acts and facts proven in each particular case, which determine the existence or non-existence of the agency."

A single sale negotiated by a special agent for that particular instance, renders the selling agent the agent of the non-resident seller for the service of summons in a suit concerning that particular transaction, although he might not be for a different transaction. Nelson Morris & Co. v. Rehkopf & Sons, 25 Ky. Law Rep., 352, 75 S. W., 203.

But where the agent has general charge of the business done in the State, even though his powers be limited, he becomes "the manager, or agent, or person in charge of such business in this State" for the service of process. The Code provision does not confine the service of process to the agent; it includes the manager and the person in charge of the business in this State.

But if the service of the summons should be confined to the defendant's agent, the service in the case at bar would nevertheless be sufficient, since Pace was appellant's agent having charge of its business in this State. It must be conceded that appellant was doing business of a certain kind, in Kentucky.

Appellant's contention, as we understand it, is that an agent for the purposes of service of process, must have such contractual powers that enable him to bind his principal; and that since Pace could, under his authority, solicit orders only, which became binding upon their acceptance by the principal, he was not an agent for the service of process.

This, however, is too narrow a view of the law of the case. Agency is a representative relation; in its broadest sense it includes every relation in which one person acts for or represents another by his authority. 31 Cyc., 1189. It is upon this principle that service of process against the agent is upheld in criminal prosecutions and in cases of tort. Commonwealth v. Bullock, 22 Ky. Law Rep., 528; Carpenter v. Laswell, 23 Ky. Law Rep., 686.

Turning to the proof in this case, we find that prior to January, 1912, the appellant was doing a general business through its agent in the State of Kentucky, with a properly designated agent therein upon whom process could be served. Its general

office was then in Louisville. After the removal of its office from Louisville to New Albany, Indiana, the method of conducting its business is perhaps best shown by the general instructions sent to all the company's general agents on November 7th, 1911, which reads as follows:

"The company's transactions hereafter with the people of Kentucky must be on a strictly interstatute commerce basis. Travelers negotiating sales must not hereafter have any headquarters or place of business in that State, but may reside there. Their authority must be limited to taking orders, and all orders must be taken subject to the approval of the general agent outside of the State, and all goods must be shipped from outside of the State after the orders have been approved. Travelers do not have authority to make a contract of any kind in the State of Kentucky. They merely take orders to be submitted to the general agent. If any one in Kentucky owes the company a debt, they may receive the money, or a check, or a draft for the same, but they do not have any authority to make any allowance or compromise any disputed claims. When a matter can not be settled by payment of the amount due, the matter must be submitted to the general collection agent, as the case may be, for adjustment, and he can give the order as to what allowance or what compromise may be accepted. All contracts of sale must be made f. o. b. from some point outside of Kentucky and the goods become the property of the purchaser when they are delivered to the carrier outside of the State. Notes for the purchase price may be taken and they may be made payable at any bank in Kentucky. All contracts of any and every kind made with the people of Kentucky must be made outside of that State, and they will be contracts governed by the laws of the various States in which we have general agencies handling interstate business with the people of Kentucky. For example, contracts made by the general agent at Parkersburg, W. Va., will be West Virginia contracts.

If any one of the company's general agents deviates from what is stated in this letter, the result will be just the same as if all them had done so. Anything that is done that places the company in the position where it can be held as having done business in Kentucky, will not only make the man transacting the business liable to a fine of from one hundred to one thousand dollars for each offense, but it will make the company liable for doing business in the State without complying with the requirements of the laws of the State. We will, therefore, depend upon you to see that these instructions are strictly carried out."

The agents were thereby authorized to take orders for goods in Kentucky, and in case a customer in Kentucky owed the company, the agents were authorized to receive money, checks, or drafts in payment thereof. Notes for the purchase price of machinery sold in Kentucky are taken by the agent, and made payable at any bank in Kentucky. At the time the summons was served upon Pace, he was a solicitor taking proposals for the purchase of appellant's goods, in substantially the same general way that the business was formerly conducted in the State, with the exception, it is claimed, that the proposals must now be accepted by the general manager at New Albany, Indiana, and not at Louisville, Ky. But evidently this is a mere change in form rather than of substance, since the authority now conceded to its traveling men was, in law, the same, and no more, than they had under the law previous to appellant's crossing from the south bank to the north bank of the Ohio river. Charles Brown Grocery Co. v. Becket, 22 Ky. L. R., 393, 57 S. W., 458; 1530; Seven Hills, etc., v. Chase, 26 Ky. L. R., 336; John Matthews Apparatus Co. v. Renz, 22 Ky. L. R., Becker Co. v. Alvey, 27 Ky. L. R., 836.

But if we should look to the decisions of other jurisdictions in determining the question whether appellant was doing business in Kentucky, within the meaning of our statute, it would seem that the case of the International Text-Book Co. v. Pigg, 217

U. S., 91, is conclusively against appellant's contention that it is not so engaged in business.

In the Pigg case, the Text-Book Company conducted a correspondence school at Scranton, Pa., and had a salaried solicitor-collector at Topeka, Kansas, who solicited applications for scholarships and collected and remitted the fees therefor. The company had no office in Kansas, and its teachings was conducted wholly by correspondence with the home office at Scranton. It will thus be seen that the relation of the Text-Book Co. to its Kansas solicitor-collector, was, in its legal effect, substantially the same as the relation of appellant to its solicitor-collector Pace in Kentucky. If, however, it should be said that there is a difference in the fact that Pace had no right to make contracts for appellant, while the Text-Book Company's solicitor-collector had that right, the criticism is sufficiently answered by the opinion in the Pigg case, which ignored that distinction, and held that the continued and permanent value of the business and the like representation of the company by its solicitor-collector as distinguished from a mere casual act or representation determined the question of business and agency. The question arose in a suit by the Text-Book Co. against one of its students to recover a subscription fee, and the defense was that the company was doing business in Kansas and had failed to comply with the laws of that State, which required a foreign corporation to file with the State Charter Board, its charter, with an extended statement of the condition and affairs of the corporation, accompanied by a fee, as a condition precedent to its right to do business in Kansas. The Supreme Court of the United States held that the Text-Book Company was doing business in Kansas.

"We conclude from the evidence before us, that the appellant was doing business in the State of Kentucky at the time the process was served upon Pace, and that Pace was appellant's agent in charge of said business, within the meaning of the Code provisions above quoted.

"2. It is insisted, however, that the business of appellant in Kentucky is interstate commerce, and that the carrying on of interstate commerce by appellant with persons residing in Kentucky does not constitute "doing business in Kentucky." This is a novel proposition; and, strictly considered, it would seem to be a matter of defense upon the merits, rather than a ground for quashing the return upon the summons, since the indictment charges no act that can be construed into an interstate business transaction. This contention would make the service of process a part of interstate commerce, and not a separate question dependent upon the doing of business in the State, or the agency of Pace.

"In support of this proposition appellant relies upon Commonwealth v. Hogan Co., 25 Ky. L. R., 41, 74 S. W., 738, and Commonwealth v. Eclipse Hay Press Co., 31 Ky. L. R., 824. Those cases, however, were prosecutions under Section 571 of the Kentucky Statutes, to recover penalties from foreign corporations for failing to file, in the office of the Secretary of State, a statement giving the name of a resident agent upon whom process might be served. Those cases merely decided that the State could not impose that burden upon interstate commerce; not that interstate commerce did not constitute doing business in the State. No such question was raised or decided.

"It is well settled that a State cannot impose any condition upon interstate business that materially or directly burdens that business; and it has been held, in a uniform line of decisions by this court, that imposing a license upon such business, or requiring the filing of a statement with the Secretary of State as a condition to the transaction of interstate business, was such a burden. Commonwealth v. Hogan, 25 Ky. L. R., 41, 74 S. W., 737; Commonwealth v. Eclipse Hay Press Co., 31 Ky. L. R., 824; Three States Buggy Co. v. Commonwealth, 32 Ky. L. R., 385, 105 S. W., 971; Milburn Wagon Co. v. Commonwealth, 139 Ky., 330.

"The cases of Crutcher v. Kentucky, 141 U. S., 47; International Text-Book Co. v. Pigg, 217 U. S., 91; Commonwealth v. Read Phosphate Co., 113 Ky., 32; Commonwealth v. Parlin, 118 Ky., 168; Milburn Wagon Co. v. Commonwealth, 139 Ky., 330; Brennan v. Titusville, 153 U. S., 289; and Caldwell v. North Carolina, 187 U. S., 621, some of which are relied upon by appellant, likewise involve the right of a municipality to impose and collect a tax upon interstate commerce, and come within the general rule above announced. But the service of a summons upon an agent imposes no burden upon appellant's business; it is not required to pay a tax, obtain a license, or file a statement with a State officer as a condition to its right to do interstate business in Kentucky.

In International Text-Book Co. v. Pigg, supra, the court said:

"It is true that the statute does not, in terms, require the corporation of another State engaged in interstate commerce to take out what is technically 'a license' to transact its business in Kansas. But it denies all authority to do business in Kansas unless the corporation makes, delivers and files a 'statement' of the kind mentioned in Section 1283. The effect of such requirement is practically the same as if a formal license was required as a condition precedent to the right to do such business. In either case it imposes a condition upon a corporation of another State seeking to do business in Kansas, which, in the case of interstate business, is a regulation of interstate commerce and directly burdens such commerce. The State cannot thus burden interstate commerce. It follows that the particular clause of Section 1283 requiring that 'statement' is illegal and void.

"In this connection it may be observed that by the statute the doors of Kansas courts are closed against the Text-Book Company, unless it first obtains from the Secretary of State a certificate showing that the 'statement' mentioned in Section 1283 has been properly made. In other words, although

the Text-Book Company may have a valid contract with a citizen of Kansas, one directly arising out of and connected with its interstate business, the statute denies its right to invoke the authority of a Kansas court to enforce its provisions unless it does what we hold it was not, under the Constitution, bound to do; namely, make, deliver and file with the Secretary of State the statement required by Section 1283. * * *

"It is sufficient to say that the requirement of the statement mentioned in Section 1283 of the statute imposes a direct burden on the plaintiff's right to engage in interstate business, and therefore is in violation of its constitutional rights. It is the established doctrine of this court that a State may not, in any form or under any guise, directly burden the prosecution of interstate business. But such a burden is imposed when the corporation of another State, lawfully engaged in interstate commerce, is required, as a condition of its right to prosecute its business in Kansas, to make and file a statement setting forth certain facts which the State, confessedly, could not control by legislation."

"In that case the Text-Book Company was required to conform to an unauthorized requirement, before it could collect its debt by judicial proceedings, and for that reason alone the judgment of the Kansas court was reversed. The same is true of the Texas cases—Albertype Co. v. Gus Feist Co., 114 S. W., 791; Eclipse P. & M. Co. v. New Process R. & S. Co., 120 S. W., 533; and Moroney H. Co. v. Goodwin Pottery Co., 120 S. W., 1091—relied upon by appellant. No such state of fact exists in the case at bar. On the contrary, appellant has been indicted in Kentucky for doing an unlawful act in Kentucky; and the offense charged is not directly or necessarily connected with interstate commerce. Appellant seks to avoid the effect of its alleged unlawful act committed in Kentucky by showing, that aside from the unlawful act charged, it has so arranged its business as to give it the character of in-

terstate business. But it is not charged that the unlawful act is a part of its interstate business, and clearly it cannot be, from its very nature.

"If the criminal laws of a State could be successfully evaded by connecting the illegal act, at some point in its developmnet, with some other act so as to give the illegal act the color of an interstate act of business, it would then become an easy matter to avoid responsibility in many cases of this character.

"The absence of merit in appellant's contention even as a defense, will be seen from the language of the court in Standard Oil Co. of Kentucky v. Tennessee, 217 U. S., 413. In that case the Oil Company, a Kentucky corporation, was ousted from Tennessee for a violation of fhe Tennessee anti-trust act. Claiming that the judgment of ouster was contrary to the 14th Amendment to the Federal Constitution, and also that it was an unconstitutional interference with commerce among the States—the same defenses that are here relied upon—the Oil Company appealed the case to the Supreme Court of the United States; but in affirming the judgment of the Tennessee court, the Supreme Court of the United States said:

"The second objection to the statute is that, although construed by the court to apply to domestic business only, nevertheless it is held to warrant turning the defendant out of the State for an interference with interstate trade. The transaction complained of was inducing merchants in Gallatin to revoke orders on a rival company for oil to be shipped from Pennsylvania, by an agreement to give them 300 gallons of oil. It is said that as the only illegal purpose that can be attributed to this agreement is that of protecting the defendants' oil against interstate competition, it could not be made the subject of punishment by the State; that the offense, if any, is against interstate commerce alone.

"The cases that have gone as far as any in favor of this proposition are those that hold invalid taxes upon sale by traveling salesmen, so far as they affect commerce among the States. Robbins v. Taxing Dist., 120 U. S., 489; Rearick v. Pennsylvania, 203

U. S., 507. These cases fall short of the conclusion to which they are supposed to point. Regulations of the kind that they deal with concern the commerce itself, the conduct of the men engaged in it, and as so engaged. The present statute deals with the conduct of third persons, strangers to the business. It does not regulate the business at all. It is not even directed against interference with that business specifically, but against acts of a certain kind that the State disapproves in whatever connection. The mere fact that it may happen to remove an interference with commerce among the States as well with the rest does not invalidate it. It hardly would be an answer to an indictment for forgery that the instrument forged was a foreign bill of lading, or for assault and battery, that the person assaulted was engaged in peddling goods from another State. How far Congress could deal with such cases we need not consider, but certainly there is nothing in the present state of the law, at least, that excludes the States from a familiar exercise of their power. See Field v. Barber Asphalt Paving Co., 194 U. S., 618, 623."

"In our view, this case presents only the questions of appellant's doing business in the State, and Pace's agency. Appellant's business transactions constituting interstate commerce, may or may not affect the trial; they do not affect the validity of the summons. The indictment does not deal with them, and its scope is not to be enlarged or diminished by affidavits filed upon a motion to quash the return upon the summons. Furthermore, upon the trial the Commonwealth may confine its proof of intra-state matters. We cannot anticipate that it will depart from the terms of the indictment. The unsoundness of appellant's contention in this respect becomes apparent when its effect is considered, in case it should be upheld and applied in practice. If the summons is to be quashed and the prosecution thereby ended, we have the anomalous institution of the violation of a substantive criminal law tried and finally disposed of in a question of procedure, upon exparte evidence; and the question of appellant's

guilt can never be tried because it proposes to do nothing but interstate business. Surely it was never intended that the wise constitutional provision for the protection of bona fide commerce among the States, should or could thus be indirectly used as a shield to protect the offender from punishment for an illegal act not directly connected with interstate commerce. It is difficult to comprehend how a conspiracy may be viewed as an act of interstate commerce; and if the crime charged is not such an act, the offender is not to escape trial by showing that its agent upon whom the summons was served, was, pursuant to the conspiracy and entirely within the State, engaged collaterally in interstate commerce. Appellant is charged with having conspired, in Kentucky, with other like companies to do certain unlawful acts; not with selling to them or to others, by sales which may have constituted interstate commerce. In our opinion the summons was properly served, and constitutes a valid process against the appellant.

"Judgment affirmed."

(147 Ky., 657).

PLAINTIFF IN ERROR CANNOT RAISE THE QUESTION IN THIS COURT THAT THE PROCEEDINGS AGAINST IT IN THOSE CASES WERE A DENIAL TO IT OF DUE PROCESS OF LAW.

In those cases the assignment of errors relies upon two propositions: One, that the summons in each case was not served upon such agent of plaintiff in error as would justify a judgment against it upon such service, and that a judgment rendered upon such service would be depriving it of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States. The second error relied upon is that service of process upon such agent and a rendering of judgment upon such service would be an interference with and a burden upon interstate com-

merce, in violation of sub-section 3, Section 8, Article 1, of the Constitution of the United States.

The records in above cases upon those questions are identical and for convenience we will refer to the Breckinridge County record.

It appears from the record that after the defendant (plaintiff in error) made its motion in the trial court to quash the service of process, and this motion was overruled, it took no further steps, until the judgment was rendered against it. Under repeated decisions of the Court of Appeals of Kentucky when a defendant in a misdemeanor case (and this was one) enters a special plea which is overruled and then enters no further plea, a judgment may be entered by default against it. (Section 157, Criminal Code of Kentucky; Commonwealth vs. Cheek, 1st Duvall, 26; Commonwealth vs. Neat, 89 Ky., 242; Payne vs. Commonwealth, 16 Ky. Law Rep., 839; Sharp vs. Commonwealth, 16 Ky. Law Rep., 840.)

In the instant cases defendant entered a special plea to the jurisdiction of the court. This plea was overruled and the defendant failed to plead further. Then judgment was rendered against it by default, all in strict accordance with the laws of Kentucky. A motion was then made by defendant to set aside the judgment because it was void, upon the ground that it had not been served with process. This motion was overruled, and from the judgment of the court imposing the fine and overruling the motion to set aside that judgment, plaintiff in error prosecuted an appeal to the Court of Appeals of Kentucky, and upon the affirmance of the judgment of the lower court a writ of error was sued out from this court from the judgment of the Court of Appeals. It nowhere appears in the record that any steps were taken in any court to enforce the judgment of the trial court. No writ of execution was issued upon that judgment and no property of the plaintiff in error was

taken possession of to satisfy that judgment. Therefore, it was not deprived of its property or attempted to be deprived of its property without due process of law. As we understand the rule, if a judgment is void because of lack of jurisdiction in the court which rendered it, the defendant against whom judgment was rendered may remain silent and wait until some steps are taken to enforce that judgment by seizure of his property or in some other manner seek to deprive him of same. When this is done, he may then take steps to prevent a seizure or a disposing of his property and assert a claim that his property is being taken without due process of law under a void judgment. But until there is some effort to seize or dispose of his property under the judgment there is no taking without due process of law and he has no right to assert such claim. This question, as we understand it has been fully determined in the case of York v. Texas, 137 U. S., page 15-20. In that case it appears that the defendant, who was sued in the district court of Travis County, Texas, was a non-resident and a citizen of St. Louis, Missouri, and in accordance with a provision of the Texas Statutes, process was served on him in that city. He appeared and filed a plea challenging the jurisdiction of the court on the ground that he was a non-resident and had not been served personally with process within the limits of the State. This plea was overruled and he again appeared in court and demanded a jury trial. When the case was called for trial he withdrew his demand for a jury, and declined to plead further, relying solely upon his plea to the jurisdiction. Judgment was rendered against him, and that judgment was appealed from and affirmed by the Supreme Court of Texas and by writ of error to this court where in discussing the question raised, the following language was used:

"It was conceded by the district and supreme courts that the service upon the defendant in St. Louis was a nullity, and gave the district court no jurisdiction; but it was held that, under the peculiar statutes of the State of Texas, the appearance for the purpose of pleading to the jurisdiction was a voluntary appearance, which brought the defendant into court. Plaintiff in error questions this construction of the Texas statutes, but inasmuch as the supreme court, the highest court of the State, has so construed them, such construction must be accepted here as correct, and the only question we can consider is as to the power of the State in respect thereto.

"It must be conceded that such statutes contravene the established rule elsewhere—a rule which also obtained in Texas at an earlier day, to-wit, that an appearance which, as expressed, is solely to challenge the jurisdiction is not a general appearance in the cause, and does not waive the illegality of the service or submit the party to the jurisdiction of the court. Harkness v. Hyde, 98 U. S., 476 (25:237); Raquet v. Nixon, Dallam (Tex.), 386; De Witt v. Monroe, 20 Tex., 289; Hagood v. Dial, 43 Tex., 625; Robinson v. Schmidt, 48 Tex., 19.

"The difference between the present rule in Texas and elsewhere is simply this: Elsewhere the defendant may obtain the judgment of the court upon the sufficiency of the service, without submitting himself to its jurisdiction. In Texas, by its statute, if he asks the court to determine any question, even that of service, he submits himself wholly to its jurisdiction. Elsewhere, he gets an opinion of the court before deciding on his own action. In Texas he takes all the risk himself. If the service be in fact insufficient, all subsequent proceedings, including the formal entry of judgment, are void: if sufficient, they are valid. And the question is, whether under the Constitution of the United States the defendant has an inviolable right to have this question of the sufficiency of the service decided in the first instance and alone.

"The Fourteenth Amendment is relied upon as invalidating such legislation. That forbids a State to 'deprive any person of life, liberty, or property without due process of law.' And the proposition is, that the denial of a right to be heard before judgment simply as to the sufficiency of the service operates to deprive the defendant of liberty or property. But the mere entry of a judgment for money, which is void for want of proper service, touches neither. It is only when process is issued thereon, or the judgment is sought to be enforced, that liberty or property is in present danger. If at that time of immediate attack protection is afforded, the substantial guarantee of the Amendment is preserved. and there is no just cause of complaint. The State has full power over remedies and procedure in its own courts, and can make any order it pleases in respect thereto, provided that substance of right is secured without unreasonable burden to parties and litigants. Antoni v. Greenhow, 107 U. S., 769 (27:469). It certainly is more convenient that a defendant be permitted to object to the service, and raise the question of jurisdiction in the first instance, in the court in which suit is pending. But mere convenience is not substance of right. If the defendant had taken no notice of this suit, and judgment had been formally entered upon such insufficient service, and under process thereon his property, real or personal, had been seized or threatened with seizure he could by original action have enjoined the process and protected the possession of his property. If the judgment had been pleaded as defensive to any action brought by him, he would have been free to deny its validity. There is nothing in the opinion of the supreme court or in any of the statutes of the State, of which we have been advised, gainsaying this right. Can it be held, therefore, that legislation simply forbidding the defendant to come into court and challenge the validity of service upon him in a personal action, without surrendering himself to the jurisdiction of the court, but which does not attempt to restrain him from fully protecting his person, his property and

his rights against any attempt to enforce a judgment rendered without due service of process and therefore void, deprives him of liberty or property, within the prohibition of the Fourteenth Amendment? We think not.

"The Judgment is affirmed."

This, in our opinion, is conclusive of this question in the case at bar.

(See Cosmopolitan Mining Co. v. Walsh, 193 U. S., 469-471.)

THE PROCESS IN THIS CASE WAS SERVED UPON THE PROPER PERSON AND THE JUDGMENT RENDERED THEREON WAS VALID AND BINDING.

Even if this Court could consider the question as to whether plaintiff in error has been deprived of his property without due process of law, yet the facts in this case justify the conclusion that the process was served upon the proper person and that the trial court had jurisdiction. This court in case of St. Louis & Southwestern Railway Company of Texas v. Robert Alexander, 227 United States, had before it a question as to the sufficiency of the service of process and in speaking of this, the Court says on page 227:

"This Court has decided each case of this character upon the facts before it, and has laid down no all-embracing rule by which it may be determined what constitutes the doing of business by a foreign corporation in such manner as to subject it to a given jurisdiction."

The affidavits filed show the following state of case:

In this case it is shown by the affidavit of J. R. Layman, Commonwealth's Attorney (found on page 12, Transcript of Record), that appellant had been for many years doing business in Breckinridge County and that

for a long period of this time O. L. Pace had been representing it, the business being that of making contracts for it, establishing local agency, and making collections and that some of the acts upon which the indictment is based were transactions in which Pace took part.

It appears from the affidavit of C. N. Schupp (page 16), Transcript of Record) that he was for more than a year continuously and at the time of the making of his affidavit (February 12, 1912) a Deputy Sheriff of Jefferson County; that prior to October 28, 1911, he received process from Hardin Circuit Court in case of Commonwealth v. International Harvester Company of America, appellant. This process must have been received by him prior to the 13th of October, 1911, because it is stated that between October 13, 1911, and October 28, 1911, he went to the office of the agent of appellant whose name was recorded in the office of Secretary of State as the proper person upon whom to serve process, for the purpose of serving process upon said agent whose name was J. L. Gardner, but was unable to find him and the office was closed. He then went to the residence of J. L. Gardner and was unable to find him there or to get any satisfactory information as to Gardner's whereabouts but his information led him to believe that Gardner was in New Albany, Indiana, and he states in his affidavit that Gardner left the State for the purpose of avoiding the service of process upon him.

The appellant filed the affidavit of O. L. Pace (page 6, Transcript of Record) who denies he was at the time of the filing of the affidavit an agent of appellant or that he was an agent at the time summons was served upon him. He states that at the time of the service of summons he was employed by appellant as a solicitor and that his authority was to solicit proposals for the purchase of goods manufactured or held for sale by appellant and when such proposals were taken by him they were forwarded to the office of appel-

lant in New Albany, Indiana, there to be accepted or rejected by it at said office and the proposals were not binding upon appellant until accepted by it at its said office. He states that he had at the time of the service and now has no authority to contract or to be contracted with for appellant and no right or authority to exercise any discretion or private judgment in the performance of his duties as such solicitor or to compromise of agents in claiming the demand due said county and he was at the time of service of process upon him and is now only an employee of appellant with the right to solicit proposals which are subject to acceptance or rejection by appellant outside of the State of Kentucky.

He further says that at the time the process was served upon him appellant was not doing business in Kentucky and had no office or offices or agents in the State.

Of course, these latter statements are mere conclusions of law as are his statements that he was not an agent of appellant. The appellant also filed the affidavit of J. L. Gardner (found on page 7, Transcript of Record) who states that he is the general agent of appellant that his offices are located in New Albany, Indiana, and for several years past had general charge and supervision of the business and affairs of appellant within a portion of the State of Kentucky, including the county of Breckinridge. It might be said here that this portion of the affidavit of Gardner is very disengenuous. To say the least of it one might infer that his office had been in New Albany for several years last past, when, as a matter of fact, his office, if established in New Albany at all, was only established subsequent to October 27, 1911, because upon that day he was, as the record of the office of the Secretary of State of Kentucky shows, the agent in Kentucky for appellant upon whom process might be served as provided by section 571 of the Kentucky Statutes and this is not the only lack of frankness or full

disclosure on part of appellant as shown by this record. He also denies that at the time Pace was served with process he was an agent of appellant and states that Pace was an employee and nothing more and his business was that of soliciting and taking written proposals for the purchase of goods belonging to and held for sale by appellant, and that such written proposals were not binding upon the company until accepted by Gardner as appellant's General Agent in New Albany, Indiana. He says Pace had no right to sell any goods for appellant or to collect any notes or obligations due appellant nor to bind appellant by any contract or to compromise any claim or demand due appellant nor had he right to exercise his private judgment or discretion in any manner connected with his duties as solicitor. He further says that since appellant ceased doing business in Kentucky there is placed in the hands of the solicitors open accounts due appellant in the district in which solicitors take proposals, but this is only by special direction given to the solicitor and that the accounts are placed in his hands by being forward to him from out of the State of Kentucky and that he has no authority to receipt the accounts in the name of the company. He states that the appellant has ceased to do business in Kentucky for a considerable period prior to January 1, 1912. This to a certain extent is a conclusion of law. He further states that when a proposal for goods from the counties in the State of Kentucky is sent to the office in New Albany, Indiana, and the proposal is accepted, the goods are shipped from without the State to each purchaser and that it does not manufacture any goods in Kentucky and it has no place of keeping or storing goods in Kentucky.

The affidavit of Wm. Browning (page 9, Transcript of Record) is also filed. He states he is the Vice-President, and Sales Manager, of appellant and his office is in the city of Chicago, State of Illinois, and that on or about the 14th of October, 1911, appellant closed all of

its places of business in Kentucky and shipped out all of its tangible personal property and since that time its business with the people of Kentucky has been purely interstate commerce; that on October 28, 1911, it revoked the authority of its designated agent upon whom process might be served and since January 1, 1912, and for some time prior thereto it has not had any known place of business in Breckinridge County or officer, or agent, in the State. He says on the 7th day of November, 1911, he sent to all of the companies general agents who negotiated any sales to the people of Kentucky the following instructions:

> "The Company's transactions hereafter with the people of Kentucky must be on a strictly interstate basis. Travelers negotiating sales must not hereafter have any headquarters or place of business in that State, but may reside there. Their authority must be limited to taking orders, and all orders must be taken subject to the approval of the general agent outside of the State, and all goods must be shipped from outside of the State after the orders have been approved. Travelers do not have authority to make a contract of any kind in the State of Kentucky. They merely take orders to be submitted to the general agent. If any one in Kentucky owes the company a debt, they may receive the money, or a check, or a draft for the same but they do not have any authority to make any allowance or compromise any disputed claims. When a matter cannot be settled by payment of the amount due, the matter must be submitted to the general or collection agent, as the case may be, for adjustment, and he can give the order as to what allowance or what compromise may be accepted. All contracts of sale must be made f. o. b. from some point outside of Kentucky and the goods become the property of the purchaser when they are delivered to the carrier outside of the State. Notes for the purchase price may be taken and they may be made payable at any bank in Kentucky. All contracts of

any and every kind made with the people of Kentucky must be made outside of that State, and they will be contracts governed by the laws of the various states in which we have general agencies handling interstate business with the people of Kentucky. For example, contracts made by the general agent at Parkersburg, W. Va., will be West Virginia contracts.

"If any one of the Company's general agents deviates from what it states in this letter, the result will be just the same as if all of them had done so. Anything that is done that places the Company in the position where it can be held as having done business in Kentucky, will not only make the man transacting the business liable to a fine of from one hundred to one thousand dollars for each offense, but it will make the company liable for doing business in the states without complying with the requirements of the laws of the State. We will, therefore, depend upon you to see that these instructions are strictly carried out. Kindly acknowledge receipt and oblige."

From these affidavits it can be reasonably concluded that appellant had been for many years doing business in Kentucky with resident agents and established offices; that its manner of conducting business was held to be inimical to the laws of this State and that it was being prosecuted for violating the anti-trust laws of Kentucky and that in order to avoid prosecutions for violating the laws of Kentucky it undertakes to withdraw its agents from the State and still undertakes to continue to do business with the people of the State under the guise of interstate commerce hoping by this means to still pursue the course which brought it within the condemnation of our State laws, and escaping the consequence thereof by pretending not to do business in Kentucky but only to be engaged in interstate commerce.

At first blush we think it will strike any reasonable person as a mere device or subterfuge to avoid the law,

upon a broader scale but actuated by the same purpose that actuates the proprietor of a "blind tiger" in carrying on his illicit business in local option counties.

Let us consider the duties of Pace at the time this process was served upon him. It is stated in the affidavit of William Browning (page 9, Transcript of Record), Vice-President of appellant, that travelers negotiating sales have authority in Kentucky to receive money on a check or draft for debts due appellant in Kentucky. Under the direction of the General Manager they may make compromises of claims. The traveling solicitors have authority to take notes for the purchase price of machinery and they may be made payable at a bank in Kentucky. They have the right to receive money in payments of uncontested claims. This is true according to the letter of instruction although Pace and Gardner both say that Pace had no such authority. We take it the letter of instructions governs.

Suppose at the time this process was served upon O. L. Pace he was asked the question, What is your business? His answer would be, I am a solicitor for the International Harvester Company of America. I am paid a salary by it to do this work in Kentucky and in Breckinridge County. I have no other business or employment. My business is to see the farmers of Breckinridge County and have them send orders for machinery, which machinery is delivered to them in Breckinridge County. I have no authority to accept a proposition, but I have the authority to arrange the preliminaries to furnish the contract and fill out its term and take the contract and send it to my general manager in New Albany, Indiana, to accept or reject and to take notes for purchase price of machinery, payable at banks in Kentucky.

Pace was subsequently employed by appellant. He was paid a salary by appellant. He devoted his entire time to appellant's business and if he was not working for him and agent of appellant then it would be very

difficult indeed to find any one who could be called an agent. It may be true his authority was limited to the soliciting of orders, to the collection of uncontested claims, to the taking of notes, but in these three respects he represented the appellant and was acting on its behalf and for it.

In case of Good Roads Machinery Company v. Commonwealth, decided February 9, 1912, 146 Ky., 690, the question of whether or not the George Bohon Company was an agent of appellant and as such the Court acquired jurisdiction of appellant by service of process upon the Bohon Company. The proof showed that the Bohon Company had but one transaction with appellant and the Court held this was not sufficient to make the company an agent for appellant in other matters so as to give the court jurisdiction over appellant by service of process upon the Bohon Company. Among other reasons for so holding the Court says:

> "The Bohon Company did not have any voice in soliciting business for it."

From this, one can reasonably infer that if the proof in the Good Roads Machinery Company case had shown that the Bohon Company was engaged generally in soliciting business for it, service upon the Bohon Company would have been sufficient.

Again it is said:

> "No claim is made that there is any evidence of a continued or even sporadic course of dealing by the Bohon Company for the appellant, Company, or that the former had the right so to do for the latter."

From this language it may be reasonably inferred that if there was proof in that case of a continued course

of dealing by the Bohon Company for the Good Roads Machine Company, that the service upon the Bohon Company would have been sufficient.

In the case at bar it is not denied that Pace was entirely occupied in soliciting business for appellant and under the rule laid down in case, supra, he was an agent of appellant upon whom process could be served. It is true that in the Good Roads Machine Company case the record showed that it had established agents in Kentucky and was admittedly doing business in Kentucky. In the case at bar it is denied that appellant was doing business in Kentucky at the time the process was served upon Pace yet we think the record conclusively shows that it was doing business. Whether it was an interstate or an intra-state business is immaterial.

In Boyd Commission Company v. Coates, 24 Ky. Law Rep., 730, it appears that appellant was a foreign corporation engaged in dealing in stocks on the New York market and in grain and provisions in the Chicago market; that it had no agents but did have correspondents, one of whom was R. L. Carter, who had an office in Clinton, Kentucky. Appellant put a private wire in the office of Carter which connected with the office of the company in St. Louis and it paid the rent of the wire which it sub-let to Carter. Carter would transmit orders obtained by him for the purchase stock for which he charged one-fourth per cent commission and appellant as Carter's agent obtained the stock on the market and gave Carter one-half per cent commission and kept the other half. All commissions collected by Carter were deposited in the Clinton Bank, and it gave checks to Carter for the amount it owed him on commission. Appellant paid all losses and retained all profits excepting the commission paid to Carter.

This Court held that in a suit against the appellant process was properly served upon Carter as its agent. The case at bar is as strong as that case. Here Pace so-

licited orders, and collected uncontested demands. The appellant accepted or rejected the orders given by Pace and sent the goods if the order was accepted to the purchaser in Kentucky.

In the case of Nelson & Morris v. E. Rehkopf & Sons, 25 Ky. Law Rep., 352, it appears that appellants were non-residents of Kentucky; that they wired to one Bransford Clark who was a broker at Paducah, their price on hides. He with these quotations of price he sold the hides to appellee in Paducah, forwarding appellees order to appellants who accepted it, the order being subject to their approval. It will be noticed that this case is very similar to the case at bar. In a suit growing out of this transaction, process was served on Bransford Clark as agent of appellant. The Court held that the business was done in Kentucky and that Clark was the proper person upon whom to serve process. The Court held that in that particular transaction he was acting for and as agent of appellants. The case at bar is identical with the Nelson Morris case with the exception that in the case of Nelson Morris & Company the authority of Clark was limited to that one transaction and as to any matter growing out of that transaction he was the agent of Nelson Morris & Company. He could not have been their agent for any other purpose or any other transaction because the record showed he only acted for them in that particular matter. In the case at bar the undisputed testimony shows that Pace acted generally for appellant in soliciting orders and sent those orders to appellant's agent in another State.

If Carter was the agent of Nelson Morris & Company in the one transaction where he solicited business and sent the order to them for their acceptance or rejection then certainly Pace was the agent of appellant in all matters relating to the sale of machinery in Breckinridge County because he was the general agent under the ruling of the Nelson Morris & Company case for ap-

pellant in soliciting orders in that county, and if the business done by Carter for Nelson Morris & Company was business done in Kentucky then the business was done in Kentucky for it.

We do not claim that by reason of those transactions appellant became subject to the payment of a license tax in Kentucky or that it necessarily was required to file with the Secretary of State the name of an agent upon whom process could be served because it could do business in Kentucky without subjecting itself to the payment of a tax or being required to file a name of an agent upon whom process could be served in the office of the Secretary of State. The business it was engaged in being of an interstate Commerce nature but still a business being done in Kentucky and those cases which hold that foreign corporations or companies doing business in Kentucky through soliciting are not required to pay license tax and are not required to file in the office of Secretary of State the name of an agent upon whom process can be served have no application to the question at bar, and we concede there are a number of such cases and the law upon those two questions is well established.

In the case of Green v. Chicago, &c. Railroad Company, 205 U. S., 530, which was decided by the Supreme Court of the United States in 1906 it appears the plaintiff brought suit in Pennsylvania against defendant company for damages for a personal injury which accrued in Colorado. The suit was filed in the Federal Circuit Court in the eastern district of Pennsylvania. Service was had upon one Heller as agent of the corporation. The motion was made to quash the return upon the process. It appeared from the testimony upon the motion that the eastern point of defendant's line was at Chicago and this extended westward; that its business was that of a common carrier of freight and passengers and for the purpose of getting this business it employed Mr. Heller and hired an office for him in Philadelphia

and designated him as district freight and passenger agent. His business was to solicit and procure passengers and freight and he employed several clerks in assisting him.

He sold no tickets, received no payments for transportation of freight. The court held that he was not such agent upon whom process should be served and gave no reasons for this opinion. The plaintiff in support of his contention that Heller was an agent quoted the cases of the Denver & Rio Grande Railroad Company v. Roller, 100 Federal 738, and Tuchband v. Chicago, &c. Railroad Company, 115 New York, 437. The Supreme Court, through Justice Moody, who delivered the opinion, says:

> "The facts in those cases were similar to those in the present case. But in both cases the action was brought in the State Courts and the question was of the interpretation of the State Statutes and the jurisdiction of the State Courts."

An examination of the case in 100 Federal, shows that it is in every respect almost identical with the case decided by Justice Moody, and the Court came to a different conclusion and held that under those facts defendant was doing business in the State and the passenger agent was the proper person upon whom to serve process. The case went from California and the Code provisions in that State as to the service of process are very similar to our Code provisions and as the case at bar was instituted in the State Courts it seems to us that the same rule that was followed in the case in 100 Federal should be followed here.

In the case of International Text-book Company v. Pigg, 217 U. S., 91, was a case arising out of the following state of facts:

> "The International Text-book Company is a Pennsylvania corporation, and the proprietor of

what is known as the Internatonal Correspondence Schools at Scranton, in that Commonwealth. Those schools have courses in architecture, chemistry, civil, mechanical, electrical and steam engineering, English branches, French, German, mathematics and mechanics, pedagogy, plumbing, heating, telegraphy, and many other subjects. It has a capital stock, and the profits arising from its business are distributed in dividends, or applied otherwise, as the company may elect. The executive officers of the company, as well as the teachers and instructors employed by it, reside and exercise their respective functions at Scranton. Its business is conducted by preparing and publishing instruction papers, text-books, and illustrative apparatus for courses of study to be pursued by means of correspondence, and the forwarding, from time to time, of such publications and apparatus to students. In the conduct of its business the company employs *local or traveling agents, called solicitors-collectors,* whose duties are to procure and forward to the company at Scranton, from persons in a specified territory, on blanks furnished by it, applications for scholarships in its correspondence schools, and also to collect and forward to the company deferred payments in scholarships. In order that applicants may adapt applications to their needs, each solicitor-collector is kept informed by correspondence with the company of the fees to be collected for the various scholarships offered, and of the contract charges to be made for cash or deferred payments, as well as the terms of payment acceptable to the company. In conformity with the contract between the company and its scholars, the scholarship and instruction papers, text-books and illustrative apparatus called for under each accepted application are sent by the company *from Scranton directly* to the applicant, and instruction is imparted by means of correspondence through the mails, between the company, at its office in that city and the applicant, at his residence in another State.

"During the period covered by the present transaction, the company had a solicitor-collector

for the territory that included Topeka, Kansas, and he solicited students to take correspondence courses in the plaintiff's schools. His office in Kansas was procured and maintained *at his own expense,* for the purpose of furthering the procuring of applications for scholarships and the collection of fees therefor. *The company had no office of its own in that state.* The solicitor-collector was paid a fixed salary by the company and a commission on the number of applications obtained and the collections made. He sent daily reports to the company for his territory, those reports showing that for March, 1906, the aggregate collections on scholarships and deferred payments on subscriptions approached $500.00."

The company sued Pigg, with whom it had a contract which *was made in Kansas,* to recover the amount alleged to be due ($76.90), Pigg's defense was that the company was doing *business in Kansas in violation of the State law which provided* that it should file certain statements and make certain reports to state officers and any foreign company failing to do this should lose its right to do business in the State.

In the determination of the case two questions arose. One was whether it was *doing business in the State.* The second was whether or not this *statute was interferring with the* interstate commerce, such was rendering the statute void as to foreign corporations.

The Supreme Court of Kansas held that the company was doing business in the State and further held that the statute was constitutional. The Supreme Court of the United States, through Justice Harlan, held the statute was an interference with interstate commerce and void as to foreign corporations, and held that under the facts the company was doing business in Kansas and uses the following language:

> "In view of the nature and extent of the business of the Internatonal Text-book Company in Kansas, the first inquiry is whether the statutory prohibition against the maintaining of an action in

a Kansas court by 'any corporation doing business in this (that) state' embraces the plaintiff corporation. It must be held, as the state court held, that it does! for it is conceded that the Text-book Company did not, before bringing this suit, make, deliver, and file with the Secretary of State either the statement or certificate required by Section 1283; and upon any reasonably interpretation of the statute, that company, both at the date of the contract sued on, and when this action was brought, must be held as 'doing business' in Kansas. *It had an agent in the state, who was employed to secure scholars for the schools* conducted by correspondence from Scranton, and to receive and forward any money obtained from such scholars. Its transactions in Kansas, by means of which it secured applications from numerous persons for scholarships, *were not single or casual transactions*, such as might be deemed incidental to its general business as a foreign corporation, but were parts of its regular business continuously conducted in many states for the benefit of its correspondence schools. While the Supreme Court of Kansas has distinctly held that the statute did not embrace *single transactions* that were only *incidentally* necessary to the business of a foreign corporation, it also adjudged that the business done by the Text-book Company in Kansas *was not of* that kind, but *indicated a purpose to regularly transact its business from time to time in Kansas*, and therefore it was to be regarded as doing business in that state, within the meaning of the statute; and that it 'was the intention of the Legislature that the state should reach every continuous exercise of a foreign franchise' and that it should apply even where the business of the foreign corporation was 'purely interstate commerce.' John Deere Plow Co. v. Wyland, 69 Kansas, 255, 257, 258, 76 Pac. 863, 2 A. & E. Ann. Cas., 304; State ex rel., Shawnee County v. American Book Co., 65 Kan., 847, 69 Pac., 563; Thomas v. Remington Paper Co., 67 Kan., 599, 73 Pac., 909; Sigel-Campion Live-stock Commission Co. v. Haston, 68 Kan., 749, 75 Pac., 1028. In our judgment, those rulings as to the scope

of the statute were correct. They were in substantial harmony with the construction placed by this court upon a Colorado statute somewhat similar to the Kansas act. A statute passed in execution of a provision in the Colorado Constitution required foreign corporations, as a condition of their authority to do business' in that state, to make and file with the Secretary of State a certificate covering certain specified matters. An Ohio corporation having made in Colorado a contract for the sale of machinery, to be sent to it from the latter state to Ohio, and the vender having failed to perform the contract, a suit was brought against him in the Federal Court sitting in Colorado. One of the defenses was the failure of the Ohio corporation to make and file with the Secretary of State the certificate required by the Colorado statute before it should be authorized or permitted to do any business' in Colorado. It became necessary to inquire whether the Ohio corporation, by reason of the above isolated contract, did business in Colorado within the meaning of the Constitution and laws of the latter state. This court said: 'Reasonably construed, the Constitution and statute of Colorado forbid, not the doing of a *single act* of business in the State, but the *carrying on* of business by a foreign corporation without the filing of the certificate and the appointment of an agent, as required by the statute * * *. The making in Colorado of the *one* contract sued on in this case, by which one party agreed to build and deliver in Ohio certain machinery and the other party to pay for it, did not constitute a carrying on of business in Colorado.

" 'To require such a certificate as a pre-requisite to the doing of a *single act* of business where there was no purpose to do *any other* business or have a place of business in the State would be unreasonable and incongruous.' Cooper Mfg. Co. v. Ferguson, 113 U. S., 727, 728, 734, 28 L. Ed., 1137, 1139, 5 Sup. Ct. Rep., 739, 741."

Again in Delamater v. State of South Dakota, in 25 U. S., page 93, it appears that a firm in St. Paul, Min-

nesota was engaged in dealing in intoxicating liquors and employed Delamater as a traveling salesman. "As such salesman he carried on the business of *soliciting orders from residents* of South Dakota for the purchase, from the firm in St. Paul, intoxicating liquors in quantities of less than five gallons." The business was conducted as follows:

He would procure from his customers, proposals to buy and would send them to the St. Paul firm and when accepted the liquor was shipped from St. Paul to the persons in South Dakota who made the proposals at their risk and cost on sixty days' credit. Delamater was prosecuted for failing to pay the license imposed by South Dakota upon the business of selling, or offering for sale, intoxicating liquor within the State by the traveling salesman who solicits orders by the jug or bottle in less than five gallons. Delamater defended upon the ground that this was an interference with interstate commerce. The Supreme Court of the United States, through Justice White, held:

First. That Delamater was doing business in South Dakota.

Second. That by reason of certain provisions of the Wilson Act he was not exempt from the payment of this license by reason of the fact that his business was interstate commerce business.

It seems to us that these two cases are authority to support the proposition; that the facts disclosed by this record show appellant was doing business in Kentucky at the time process was served. Now, if it was doing business in this State then it certainly was doing that business through agents and the proof is uncontradicted that the agent through whom it was doing this business was Pace, upon whom process was served.

From all this it appears that Pace was doing the same character of business for plaintiff in error that he was doing before its removal from Kentucky to New Al-

bany, Indiana, and to hold that a process served upon him in a suit for acts alleged to have been done before the removal of plaintiff from Kentucky would be depriving citizens of Kentucky or the Commonwealth of Kentucky and citizens of Kentucky from asserting a right in its courts, which would work a manifest injustice and hardship upon it and them.

Upon the subjects under this heading, we find in 19th Cyc., page 1348, the rule is stated as follows:

> "A foreign corporation which has gone into another State and done business and incurred liabilities there, can not by withdrawing from such State, or by returning to the State of its own domicile escape responsibility for the obligation thus incurred; but it may be sued to enforce such obligations in a court of a State where they were incurred, provided service of process can be had upon it in the mode prescribed by statute." See Augusta Nat'l Bank v. Sou. Porcelain Mfg. Co., 55 Ga., 36; McChord Lumber Co. v. Doyle, 97 Fed., 22; 38 C. C. A., 34; Boggs v. Minn., etc., Co., 105 Md., 371; 66 A., 259.

We find on the same page and in the same paragraph of Cyc. the further statement as follows:

> "Under some statutes it is held that where a foreign corporation comes into a State and does business complying with the law by appointing an agent for the service of process or agreeing, expressly or impliedly, that in actions against it, arising out of its business in the State process may be served on the public officer designated by statute, it can not prevent actions against it arising out of its business in the State by withdrawing therefrom and attempting to revoke the authority to receive service of process conferred upon such agent or public officer, the appointment of the agent for such purpose being irrevocable." Equity Life Ins. Co. v. Gauman, 119 Ga., 271, 46 S. E., 100; Home Ben. Soc.

v. Muel, 109 Ky., 479; Germania Insurance Co. v. Ashby, 112 Ky., 303 A. M. St. Rep., 295.

We find further in Cyc., page 1347, the further rule:

"The cancellation by a public officer under statutory authority of the license to do business within the State granted to a foreign corporation, after it has consented, as required by statute, the service of process upon a particular officer of the State in any action brought in the State should be a valid service upon the company, does not render the service after the cancellation insufficient to bring the company into a court of the State as a party defendant to a such brought by a citizen upon a cause of action, which arose out of a transaction between the parties while the corporation was carrying on business in the State under the license." See also Mutual Reserve Fund L. Assoc. v. Phelps, 190 U. S., 147; 23 S. Ct., 707, 47 L. Ed., 987.

TO HOLD THAT PLAINTIFF IN ERROR WAS PROPERLY SERVED WITH PROCESS AND THE JUDGMENT RENDERED AGAINST IT VALID, WILL NOT VIOLATE THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

It is insisted by plaintiff in error that Sub-section 3 of Section 8 of Article 1, of the United States Constitution, would be violated by holding the service of process in the instant case valid. We cannot understand how this could be. It will be remembered that plaintiff in error on the 28th day of October, 1911, revoked the authority of its agent upon whom process could be served in Kentucky by filing with the Secretary of State of Kentucky as the law requires, a statement showing that the authority to serve process upon an agent in Kentucky

had been withdrawn. This was the date of its formal withdrawal from Kentucky (if it did in law and fact withdraw) and up to that time it was confessedly doing business in Kentucky. The indictment charges that within one year before October 14, 1911 (the date the indictment was returned by the grand jury of Breckinridge County), the defendant (plaintiff in error) in Breckinridge County entered into an agreement with other companies to enhance in Breckinridge County the price of its machines above their real value, and did in Breckinridge County within one year before October 14, 1911, sell its machines at a price above their real value, so the offense, if committed, at all, was committed by selling in Breckinridge County within one year before October 14, 1911, its machines above their real (or market) value.

In the very nature of things, the offense charged in the indictment could not effect a sale of any machine which was sold elsewhere than in Breckinridge County, and if the machine was an article of interstate commerce, the indictment would not apply. Therefore, we must consider this case from the standpoint of plaintiff in error, as one where the offense was committed in Breckinridge County, and where the process was served upon the agent of the defendant who was engaged at the time of the service of the process in interstate commerce. How can this service of process in this case interfere with interstate commerce? It does not attempt to levy any burden upon it. It does not attempt to punish any one engaging in it. All that is done is to say to plaintiff in error: You committed certain offenses in Breckinridge County, while you were doing an intrastate business in Kentucky. We have notified you through your agent, who is doing an interstate business in Kentucky, to come forward and show why you should not be punished for an offense it is charged you committed while engaged in intrastate business. The Com-

monwealth is not seeking to punish you for anything you did after you left the State of Kentucky, but what you did while living in the State of Kentucky. The Commonwealth does not in any manner or form seek to investigate your conduct as a dealer in interstate commerce.

The contention of plaintiff in error is so fully answered in the opinion of the Court of Appeals in the Breckinridge County case, that we will close our brief with a quotation from that opinion:

> "It is insisted, however, that the business of appellant in Kentucky is interstate commerce, and that the carrying on of interstate Commerce by appellant with persons residing in Kentucky does not constitute 'doing business in Kentucky.' This is a novel proposition; and, strictly considered, it would seem to be a matter of defense upon the merits, rather than a ground for quashing the return upon the summons, since the indictment charges no act that can be construed into an interstate business transaction. This contention would make the service of process a part of interstate commerce, and not a separate question dependent upon the doing of business in the State, or the agency of Pace.
>
> "In support of this proposition appellant relies upon Commonwealth v. Hogan Co., 25 Ky. L. R., 41, 74 S. E., 738, and Commonwealth v. Eclipse Hay Press Co., 31 Ky. L. R., 824. Those cases, however, were prosecutions under section 571 of the Kentucky Statutes, to recover penalties from foreign corporations for failing to file, in the office of the Secretary of State, a statement giving the name of a resident agent upon whom process might be served. Those cases merely decided that the State could not impose the burden upon interstate commerce; not that interstate commerce did not constitute doing business in the State. No such question was raised or decided.
>
> "It is well settled that a State cannot impose any condition upon interstate business that ma-

terially or directly burdens that business; and it has been held, in a uniform line of decisions by this court, that imposing a license upon such business, or requiring the filing of a statement with the Secretary of State as a condition to the transaction of interstate business, was such a burden. Commonwealth v. Hogan, 25 Ky. L. R., 41, 74 S. W., 737; Commonwealth v. Eclipse Hay Press Co., 31 Ky. L. R., 385, 105 S. W., 971; Milburn Wagon Co. v. Commonwealth, 139 Ky., 330.

"The cases of Crutcher v. Kentucky, 141 U. S., 47; International Text-Book Co. v. Pigg, 217 U. S., 91; Commonwealth v. Read Phosphate Co., 113 Ky., 32; Commonwealth v. Parlin, 118 Ky., 168; Milburn Wagon Co. v. Commonwealth, 139 Ky., 330; Brennan v. Titusville, 153 U. S., 289; and Caldwell v. North Carolina, 187 U. S., 621, some of which are relied upon by appellant, likewise involve the right of a municipality to impose and collect a tax upon interstate commerce, and come within the general rule above announced. But the service of a summons upon an agent imposes no burden upon appellant's business; it is not required to pay a tax, obtain a license, or file a statement with a state officer as a contion to its right to interstate business in Kentucky.

"In International Text-Book Co. v. Pigg, supra, the court said:

"It is true that the statute does not, in terms, require the corporation of another State engaged in interstate commerce to take out what is technically 'a license' to transact its business in Kansas. But it denies all authority to do business in Kansas unless the corporation makes, delivers and files a 'statement' of the kind mentioned in section 1283. The effect of such requirement is practically the same as if a formal license was required as a condition precedent to the right to do such business. In either case it imposes a condition upon a corporation of another State seeking to do business in Kansas, which, in the case of interstate business, is a regulation of interstate commerce and directly burdens such commerce. The State cannot thus burden interstate commerce. It follows that the particular

clause of section 1283 requiring that 'statement' is illegal and void.

"In this connection it may be observed that by the statute the doors of Kansas courts are closed against the Text-Book Company, unless it first obtains from the Secretary of State a certificate showing that the 'statement' mentioned in section 1283 has been properly made. In other words, although the Text-book Company may have a valid contract with a citizen of Kansas, one directly arising out of and connected with its interstate business, the statute denies its right to invoke the authority of a Kansas court to enforce its provisions unless it does what we hold it was not, under the Constitution, bound to do; namely, make, deliver and file with the Secretary of State the statement required by section 1283.

"It is sufficient to say that the requirement of the statement mentioned in section 1283 of the statute imposes a direct burden on the plaintiff's right to engage in interstate business, and, therefore, is in violation of its constitutional rights. It is the established doctrine of this court that a State may not, in any form or under any guise, directly burden the prosecution of interstate business. But such a burden is imposed when the corporation of another State, lawfully engaged in interstate commerce, is required, as a condition of its right to prosecute its business in Kansas, to make and file a statement setting forth certain facts which the State, confessedly, could not control by legislation.' "

"In that case the Text-Book Company was required to conform to an unauthorized requirement. before it could collect its debt by judicial proceedings and for that reason alone the judgment of the Kansas court was reversed. The same is true of the Texas cases: Albertype Co. v. Gus Fiest Co., 114 S. W., 791; Eclipse P. & M. Co. v. New Process R. & S. Co., 120 S. W., 533; and Moroney H. Co. v. Goodwin Pottery Co., 120 S. W., 1091, relied upon by appellant. No such state of facts exists in the case at bar. On the contrary, appellant has been indicted in Kentucky for doing an unlawful act in

Kentucky; and the offense charged is not directly or necessarily connected with interstate commerce. Appellant seeks to avoid the effects of its alleged unlawful act committed in Kentucky by showing, that aside from the unlawful act charged, it has so arranged its business as to give it the character of interstate business. But it is not charged that the unlawful act is a part of its interstate business, and clearly it cannot be, from its very nature.

"If the criminal laws of a State could be successfully evaded by connecting the illegal act, at some point in its development, with some other act so as to give the illegal act the color of an interstate act of business, it would then become an easy matter to avoid responsibility in many cases of this character.

"The absence of merit in appellant's contention, even as a defense, will be seen from the language of the court in Standard Oil Co. of Kentucky v. Tennessee, 217 U. S., 413. In that case the Oil Company, a Kentucky corporation, was ousted from Tennessee for a violation of the Tennessee anti-trust act. Claiming that the judgment of ouster was contrary to the 14th Amendment to the Federal Constitution, and also that it was an unconstitutional interference with commerce among the States—the same defenses that are here relied upon—the Oil Company appealed the case to the Supreme Court of the United States; but in affirming the judgment of the Tennessee Court, the Supreme Court of the United States said:

'The second objection to the statute is that, although construed by the court to apply to domestic business only, nevertheless it is held to warrant turning the defendant out of the State for an interference with interstate trade. The transaction complained of was inducing merchants in Gallatin to revoke orders on a rival company for oil to be shipped from Pennsylvania, by an agreement to give them 300 gallons of oil. It is said that as the only illegal purpose that can be attributed to this agreement is that of protecting the defendants' oil against interstate competition, it could not be made the sub-

ject of punishment by the State; that the offense, if any, is against interstate commerce alone.

'The cases that have gone as far as any in favor of this proposition are those that hold invalid taxes upon sale by traveling salesmen, so far as they effect commerce among the states. Robbins v. Taxing Dist., 120 U. S., 389; Rearick v. Pennsylvania, 203 U. S., 507. These cases fall short of the conclusion to which they are supported to point. Regulations of the kind that they deal with concern the commerce itself, the conduct of the men engaged in it, and as so engaged. The present statute deals with the conduct of third persons, strangers to the business. It does not regulate the business at all. It is not even directed against interference with that business specifically, but against acts of a certain kind that the state disapproves in whatever connection. The mere fact that it may happen to remove an interference with commerce among the states as well with the rest does not invalidate it. It hardly would be an answer to an indictment for forgery that the instrument forged was a foreign bill of lading, or for assault and battery, that the person assaulted was engaged in peddling goods from another state. How far Congress could deal with such cases we need not consider, but certainly there is nothing in the present state of the law, at least, that excludes the states from a familiar exercise of their power. See Field v. Barber Asphalt Paving Co., 194 U. S. 618, 623.'

"In our view, this case presents only the question of appellant's doing business in the State, and Pace's agency. Appellant's business transaction constituting interstate commerce, may or may not affect the trial; they do not affect the validity of the summons. The indictment does not deal with them, and its scope is not to be enlarged or diminished by affidavits filed upon a motion to quash the return upon the summons. Furthermore, upon the trial the Commonwealth may confine its proof to intrastate matters. We cannot anticipate that it will depart from the terms of the indictment. The unsoundness of appellant's contention in this respect becomes ap-

parent when its effect is considered, in case it should be upheld and applied in practice. If the summons is to be quashed and the prosecution thereby ended, we have the anomalous situation of the violation of a substantive criminal law tried and finally disposed of in a question of procedure, upon ex-parte evidence; and the question of appellant's guilt can never be tried because it proposes to do nothing but interstate business. Surely it was never intended that the wise constitutional provision for the protection of a bona-fide commerce among the States, should or could thus be indirectly used as a shield to protect the offender from punishment for an illegal act not directly connected with interstate commerce. It is difficult to comprehend how a conspiracy may be viewed as an act of interstate commerce; and if the crime charged is not such an act, the offender is not to escape trial by showing that its agent upon whom the summons was served, was, pursuant to the conspiracy and entirely within the State, engaged collaterally in interstate commerce. Appellant is charged with having conspired, in Kentucky, with other like companies to do certain unlawful acts; not with selling to them or to others, by sales which may have constituted interstate commerce. In our opinion the summons was properly served, and constitutes a valid process against the appellant.

From the whole case, we believe the judgment of the Court of Appeals of Kentucky was right, and ask affirmance of same.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1913.

INTERNATIONAL HARVESTER COMPANY OF AMERICA, *Plaintiff in Error,* vs. COMMONWEALTH OF KENTUCKY, *Defendant in Error.*	No. 297. Error to the Court of Appeals of Kentucky. (Breckinridge County)
INTERNATIONAL HARVESTER COMPANY OF AMERICA, *Plaintiff in Error,* vs. COMMONWEALTH OF KENTUCKY, *Defendant in Error.*	No. 298. Error to the Court of Appeals of Kentucky. (Boyle County)

REPLY FOR PLAINTIFF IN ERROR.

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SUBJECT INDEX.

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REPLY.

I.

Under the construction given to the Kentucky process statute, a person or corporation doing an exclusively interstate commerce business is compelled to subject itself to the jurisdiction of the Kentucky courts.

The basis of the decision below is found in this statement of the Kentucky Court of Appeals in the *Breckinridge County case* (No. 297, Tr., 35):

> "Appellant's business transactions *constituting interstate commerce*, may or may not affect the trial; they *do not affect the validity of the summons.*"

The gist of the opinion is thus summed up by counsel for the Commonwealth (Brief, 35): "Whether it was an interstate or an intra-state business is immaterial."

Service was held valid under sub-sections 3 and 6 of Section 51 of the Kentucky Statutes. Since the Court of Appeals in construing these sections held that the character of business plaintiff in error was doing—whether intra- or interstate,—is immaterial, the statutes are to be read as follows:

> "Section 3. In an action against a private corporation, the summons may be served, in any county, upon the defendant's chief officer, or agent, who may be found in this state, *even though such corporation and such officer or agent are engaged only in interstate commerce;* or it may be served in the county wherein the action is brought upon the defendant's chief officer or agent who may be found therein; * * *.
>
> Section 6. In actions against an individual residing in another state, or a partnership, association, or joint stock company, the members of which reside in another state, engaged in business in this state, *even though such business be purely interstate*, the summons may be served on the manager, or agent of, or person in charge of, such business in this state, in the county where the business is carried on, or in the county where the cause of action occurred."

The words italicized show the language read into the foregoing sections by the Court of Appeals. As thus construed they are clearly unconstitutional, as affixing a condition and restriction to the unqualified constitutional right to engage in interstate commerce.

But counsel contend, under the decision in *York* v. *Texas*, 137 U. S., 15, that until property of plaintiff in error has been seized, or an attempt has been directly made to subject its property to the payment of the judgment entered, no federal question arises—this appeal to federal jurisdiction under the Constitution is premature.

This is a misapprehension, both of what was decided in the *York* case, and of what is involved in the instant case. The sole point decided in the *York* case was that a statute, providing that any appearance by a defendant to challenge process itself constitutes a submission to the court's jurisdiction, did not violate the "due process" clause of the Fourteenth amendment.*

In *Kauffman* v. *Wootters*, 138 U. S., 285, at p. 287, the *York* case was cited to support the same holding, that the statutory provision, making an entry of appearance to challenge process a general entry of appearance, was "consistent with due process of law," and that a judgment of a state court based upon such an appearance raised no federal question.

But in the instant cases, when the Kentucky Court of Appeals held that service of process upon a mere solicitor of orders in Kentucky was good service upon his principal, its decision involved a federal question, namely, the right of Kentucky arbitrarily to domicil in its state, for purposes of process, a non-resident corporation engaged only in interstate commerce. Sub-secs. 3 and 6 of Sec. 51, as thus construed by the Kentucky Court of Appeals, affix a condition or limitation upon the right of a non-resident to carry on interstate commerce in the state, and the validity of such a restriction is the federal question. This federal question and right was claimed in the Court of Appeals under the Federal Constitution (No. 297, Tr., 37), and if sustained by that court would have resulted in its reversing the judgment against plaintiff in error. It being denied there, we have the right to bring it here, and to ask the reversal of that judgment.

*This was the sole point decided, and in support only of it the *York* case has been cited.

Kauffman v. *Wootters*, 138 U. S., 285, 287.
C. N. O. & T. P. R. Co. v. *Slade*, 216 U. S., 78, 83.
M. K. & T. Ry. Co. v. *Goodrich*, 229 U. S., 607, 608.

So also the case of *Cosmopolitan Mining Co.* v. *Walsh*, 193 U. S. 460, 469-71, cited by counsel (Brief, p. 27), decided only that no federal question was involved:

> "The substantial controversy which the case presented involved the mere determination of what was the law of Colorado on the subject" (p. 472).

Therefore, the *York* and *Cosmopolitan Mining Company* cases have no application here. They challenge only the correctness of the decision of the state court in construing a state statute relating to process. We are challenging the constitutionality of the Kentucky statute as construed, because it imposes a condition or restriction on the right to carry on interstate commerce, as well as denying due process of law.

The plain and necessary effect of the ruling of the Kentucky Court of Appeals is to give state courts the same jurisdiction over non-resident corporations which send representatives into the state to solicit business in interstate commerce, that those courts would have if such non-resident corporations had formally appointed a local agent to accept service of process. The court can no more construe and then enforce sub-sections 3 and 6 as it has, than the legislature can require the appointing of a local agent for purposes of service of process, as a condition precedent to carrying on interstate trade.

A STATE CANNOT ARBITRARILY PROVIDE THAT A PERSON OR CORPORATION ENGAGED SOLELY IN CONDUCTING AN INTERSTATE-COMMERCE BUSINESS HAS THEREBY SUBMITTED TO ITS JURISDICTION.

The principles for which we contend may be briefly summarized as follows:

(1) To render a foreign corporation liable to suit, as said by Mr. Justice Day in *St. Louis S. W. Ry. Co.* v. *Alexander*, 227 U. S., 218, 227:

> "The business must be such in character and ex-

tent as to warrant the inference that the corporation has subjected itself to the jurisdiction and laws of the district in which it is served."

In short, a foreign corporation must, either expressly or by necessary implication, have voluntarily subjected itself to the jurisdiction of the state.

(2) A state cannot force an express consent to service of process (by the appointment of a statutory agent), from a corporation doing solely an interstate commerce business.

Cooper Manufacturing Co. v. *Ferguson*, 113 U. S., 727, 736.

A fortiori it cannot imply one, simply from the fact that a foreign corporation is conducting an interstate commerce business with residents of the state.

Therefore, the state cannot say that a foreign corporation, transacting only interstate commerce, has subjected itself to its jurisdiction. For a state cannot impose any condition upon the right of a foreign corporation to transact an interstate commerce business with its residents.

(3) The plaintiff in error clearly was transacting solely an interstate commerce business.

Crenshaw v. *Arkansas*, 227 U. S., 389, 395.
Rogers v. *Arkansas*, 227 U. S., 401, 409.
Brennan v. *Titusville*, 153 U. S., 289, 298.
Caldwell v. *North Carolina*, 187 U. S., 622, 632.

(4) Therefore, a statute providing for the service under the facts of this case is clearly beyond the power of the state and invalid under the commerce clause of the United States Constitution. As construed by the Court of Appeals it arbitrarily seeks to render persons and corporations engaged solely in interstate commerce subject to state tribunals.

All the authorities support our contention that before a foreign corporation can be sued it must submit to the jurisdiction of the state court. Thus, as pointed out in *St. Clair* v. *Cox*, 106 U. S., 350, 354:

> "Formerly it was held that a foreign corporation could not be sued in an action for the recovery of a personal demand outside of the state by which it was chartered. The principle that a corporation must dwell in the place of its creation, and cannot, as said by Chief Justice Taney, migrate to another sovereignty, coupled with the doctrine that an officer of the corporation does not carry his functions with him when he leaves his state, prevented the maintenance of personal actions against it. There was no mode of compelling its appearance in the foreign jurisdiction. Legal proceedings there against it were, therefore, necessarily confined to the disposition of such property belonging to it as could be there found; and to authorize them legislation was necessary."

But the doctrine that a foreign corporation could not be sued without its express consent caused much hardship and inconvenience. Hence, the doctrine of an implied consent was invoked. That is to say, since a corporation can only do an intra-state business in a foreign state with the latter's consent, such a foreign state may impose *as a condition* to the right of the corporation to conduct that *intra-state business*, that it submit to the jurisdiction of the state courts. This submission to the jurisdiction may be express or implied; the carrying on of an intra-state business by a foreign corporation is an implied submission to state jurisdiction.

In *Baltimore & Ohio R. R. Co.* v. *Harris*, 12 Wall., 65, 81, this court held that a Maryland corporation could be sued in the District of Columbia, because it was doing business there pursuant to a statutory permission and said:

> "It cannot migrate, but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. *One of these conditions may be that it shall consent to be sued there. If it do business there* it will be presumed to have assented and will be bound accordingly. *Lafayette Ins. Co.* v. *French*, 18 How., 405."

In *ex parte Schollenberger*, 96 U. S., 369, 376, after reviewing and approving *B. & O.* v. *Harris, supra*, the court upheld a state statute requiring the designation of an agent within Pennsylvania for purposes of service upon an insurance company, and said:

> "Applying these principles to the present case, there cannot be any doubt, as it seems to us, of the jurisdiction of the Circuit Court over these defendant companies. They have, in express terms, in consideration of a grant of the privilege of doing business within the State, agreed that they may be sued there; that is to say, that they may be *found* there for the purposes of the service of process issued 'By any court of the Commonwealth having jurisdiction of the subject matter.' This was a condition imposed by the State upon the privilege granted, and it was not unreasonable. *Ins. Co.* v. *French*, 18 How., 404."

Mr. Justice FIELD said in *St. Clair* v. *Cox* (106 U. S., at p. 356):

> "A corporation of one state cannot do business in another state without the latter's consent, express or implied, and that consent may be accompanied with such conditions as it may think proper to impose. As said by this court in *Ins. Co.* v. *French*, 'These conditions must be deemed valid and effectual by other states and by this court, provided they are not repugnant to the Constitution or laws of the United States nor inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, or that principle of natural justice which forbids condemnation

without opportunity for defense.' 18 How., 407; *Paul* v. *Virginia*, 8 Wall., 181.

The state may, therefore, impose as a condition upon which a foreign corporation shall be permitted to do business within her limits, that *it shall stipulate that, in any litigation arising out of its transactions in the state, it will accept as sufficient the service of process on its agents or persons specially designated;* and the condition would be eminently fit and just. And such condition and stipulation may be implied as well as expressed. * * *

When service is made within the state, upon an agent of a foreign corporation, it is essential, in order to support the jurisdiction of the court to render a personal judgment, that it should appear somewhere in the record, either in the application for the writ, or accompanying its service, or in the pleadings or the finding of the court, that the corporation *was engaged in business in the state.*"

In *Conley* v. *Mathieson Alkali Works*, 190 U. S., 406, 411, the court said:

"The principle announced in *Goldey* v. *Morning News* (156 U. S., 518), covers the case at bar. The residence of an officer of a corporation does not necessarily give the corporation a domicil in the state. He must be there officially,—there representing the corporation in its business. * * * In other words, a corporation *must be doing business there*, and, recognizing the necessity of this, the Circuit Court referred that issue to a master."

In *Peterson* v. *C. R. I. & P. R. Co.*, 205 U. S., 364, 394, this court, by Mr. Justice Day, said:

"But it is essential to the validity of such service that the corporation *shall be doing business within the state*, and that the service be upon an agent representing the corporation with respect to *such business.*"

The last three cases were cited and approved by this court in the recent case of *Mechanical Appliance Co.* v. *Castleman*, 215 U. S., 437, 442.

A STATE CAN IMPOSE NO CONDITION WHATEVER UPON THE RIGHT TO CARRY ON INTERSTATE COMMERCE.

In the *Minnesota Rate* cases, 230 U. S., 352, 401, Mr. Justice HUGHES, in delivering the court's opinion, said that a state had no power "to exclude from the limits of the state corporations or others engaged in interstate commerce or to fetter by conditions their right to carry it on."

In *Crutcher* v. *Kentucky* (1891), 141 U. S., 47, 57, 58, a Kentucky statute requiring a license for agents of a foreign express company carrying on interstate business, was held void. This court, by Mr. Justice BRADLEY, said:

> "If a partnership firm of individuals should undertake to carry on the business of interstate commerce between Kentucky and other states, it would not be within the province of the state legislature to exact conditions on which they should carry on their business, nor to require them to take out a license therefor. **To carry on interstate commerce is not a franchise or a privilege granted by the state; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States,* and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject.** * * *
>
> (p. 58) We have repeatedly decided that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it."

In *Cooper Manufacturing Co.* v. *Ferguson* (1885), 113 U. S., 727, 736, the constitution and statute of Colorado, requiring corporations doing business in the state to file

*Quoted with approval in *International Text Book Co.* v. *Pigg*, 217 U. S., 91, 109, and *Buck Stove & Range Co.* v. *Vickers* (1912), 226 U. S., 205, 215.

a certificate designating an agent at a principal place of business upon whom process might be served, was held invalid as to a foreign corporation engaged only in interstate commerce in Colorado. Mr. Justice MATTHEWS said:

> "Whatever power may be conceded to a state, to prescribe conditions on which foreign corporations *may transact business within its limits*, it cannot be admitted to extend so far as to prohibit or regulate commerce among the states; for that would be to invade the jurisdiction which, by the terms of the Constitution of the United States, is conferred exclusively upon Congress.
>
> In the present case, the construction claimed for the Constitution of Colorado, and the statute of that state passed in execution of it, cannot be extended to prevent the plaintiff in error, a corporation of another state, from transacting any business in Colorado, which, of itself, is commerce. The transaction in question was clearly of that character. It was the making of a contract in Colorado to manufacture certain machinery in Ohio, to be there delivered for transportation to the purchasers in Colorado. That was commerce; and *to prohibit it, except upon conditions*, is to regulate commerce between Colorado and Ohio, which is within the exclusive province of Congress. It is quite competent, no doubt, for Colorado to prohibit a foreign corporation from acquiring a domicil in that state, and to prohibit it from carrying on within that state its business of manufacturing machinery. But it cannot prohibit it from selling in Colorado, by contracts made there, its machinery manufactured elsewhere, for that would be to regulate commerce among the states."

In the recent case of *Barrett* v. *New York*, 232 U. S., 14, 30, 31, this court held that an ordinance of New York City, requiring local express companies to take out a license and employ only citizens of the United States, was invalid as an interference with the interstate business which was carried on by an express company in connec-

tion with its intra-state business. The court, by Mr. Justice HUGHES, said:

> "But if the above mentioned sections are to be deemed to require that a license must be obtained as a condition precedent to conducting the interstate business of an express company, we are of the opinion that, so construed, they would be clearly unconstitutional. * * * As was said by this court in *Crutcher* v. *Kentucky*, *supra*, 'A state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it.'"

Since a state has no power to impose a condition upon the right to transact an interstate commerce business, it follows that the state has no right to enact that a foreign corporation shall, as a condition or incident to the carrying on of an interstate commerce business, be deemed to have submitted to the jurisdiction of state courts. And this is precisely what the Kentucky Statute, as construed, provides.

Kentucky has, both in its Constitution and its Statutes, provisions requiring the express consent of foreign corporations doing business within its borders, to service of process. Section 194 of the Constitution provides that foreign corporations carrying on business in the state must "have an authorized agent or agents there, upon whom process may be executed." Sec. 571 of the Kentucky Statutes is to like effect and provides that the name and address of the agent, upon whom service of process might be had, must be given to the Secretary of State. In this very case the Kentucky Court of Appeals recognized that these provisions are not applicable to a corporation doing solely an interstate commerce business. But the court holds that though this express consent to service cannot be compelled, an implied consent may be found

because an employee engaged in interstate business is served in the state. But clearly a state cannot imply a consent under circumstances where it could not compel an express consent.

The plain purpose and effect, therefore, of the Kentucky process statute, as construed and applied herein, is that a foreign corporation may not have in Kentucky any employe engaged exclusively in interstate commerce business without that corporation thereby becoming subject to the process of the state courts. The effect of this is precisely the same as though the statute expressly stated that no representative of a foreign corporation could come into the state to carry on interstate commerce for that corporation, unless such corporation first designated a representative to accept service of process for it in Kentucky; or that a foreign corporation which had in the state an agent engaged solely in interstate commerce business, became thereby domiciled within the state and subject to the process of its courts exactly as though it had formally complied with the provisions for licensing foreign corporations.

The holding in the recent case of *Harrison* v. *St. L. & S. F. R. Co.*, 232 U. S., 318, 331, is apt here by analogy. There, an Oklahoma statute provided

> "that the domicile of every person, firm or corporation conducting a business in person, by agent, through an office, or otherwise transacting business within the State * * * shall be for all purposes deemed and held to be the State of Oklahoma."

This Court held that this was a mere attempt to deprive a foreign corporation of its right to remove suits to a federal court "by arbitrarily creating a fictitious legal status incompatible with the existence of the right" (p. 331). In the instant cases the Court of Appeals, by holding that the question of whether or not the plaintiff

in error was engaged solely in interstate commerce was immaterial, construes the process statute so that it arbitrarily attempts to impose the condition of submission to the jurisdiction, upon the right to carry on the interstate commerce business. And this, as we have seen, cannot be done.

The basis for the prohibition against the action of the state is not necessarily that the conditions are burdensome or embarrassing, but that a state has no right to affix any condition to "a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States." The condition attempted to be affixed—that the doing of the interstate commerce by the plaintiff in error is tantamount to a consent that it may be sued locally—is void, because it is beyond the power of the state. The question is not one of degree of restraint, but of power to attach any condition or restriction at all.

Regulations providing for consent of foreign corporations engaged solely in interstate commerce to service, whether burdens or not, are not the sort of regulations which the states, under the constitution, have reserved the power to make. A foreign corporation has the absolute right to send its solicitors into Kentucky to take orders for articles of commerce. It does not need the permission of Kentucky. It is a right to which Kentucky can neither attach any conditions nor add any consequences to its exercise. In the instant cases Kentucky has made it a condition and a result of plaintiff in error's doing interstate business there that it consent to submit itself to the process of Kentucky courts.

II.

The cases relied upon by the Commonwealth do not sustain its contentions.

The two authorities chiefly relied upon are the *Pigg* case, 217 U. S., 91, and *Delamater* v. *South Dakota,* 205 U. S., 93.

In the first case the International Text-Book Company had a solicitor in Kansas securing orders for educational books and pamphlets to be furnished by the Company from Scranton, Pa. In an action brought by the Company for goods thus sold in interstate commerce, Pigg pleaded that, by the express provision of the Kansas statute, the Company was deprived of the right to sue in Kansas courts, because, being a foreign corporation, it had not filed a statement of its business with the Charter Board. The Supreme Court of Kansas sustained the plea, holding that the Company was engaged in business in the state, and, therefore, was subject to the statute. This court, in reviewing the decision, used the language which counsel have quoted on pages 38-42 of their brief, to the effect that the Text-Book Company was engaged in business in the state as described in the Kansas statute. But the quotation ends where the pertinent language begins (217 U. S., bottom p. 107):

> "We must next inquire whether the statute of Kansas, if applied to the International Text-Book Company, would directly burden its right by means of correspondence through the mails and by its agents, to secure written agreements with persons in other states, whereby such persons, for a valuable consideration, contract to pay a given amount for scholarships in its correspondence schools, and to have sent to them, as found necessary, from time to time, books, papers, apparatus, and information,

needed in the prosecution, in their respective states, of the particular study which the scholar has elected to pursue under the guidance of those who conduct such schools at Scranton? Let us see what effect the statute, by its necessary operation, must have on the conduct of the company's business.

* * * * *

Was it competent for the state to prescribe, *as a condition of the right of the Text-Book Company to do interstate business in Kansas,* such as was transacted with Pigg, that it should prepare, deliver, and file with the secretary of state the statement mentioned in Sec. 1283? The above question must be answered in the negative upon the authority of former adjudications by this court. A case in point is *Crutcher* v. *Kentucky,* 141 U. S., 47, 56, 57, often referred to and never qualified by any subsequent decision."

To the statement that no license was required by the Kansas statute, this court said (p. 111):

"In either case it imposes a *condition* upon a corporation of another state seeking to do business in Kansas, which, in the case of interstate business, is a regulation of interstate commerce and directly burdens such commerce. The state cannot thus burden interstate commerce."

Therefore, it appears from the opinion itself that, although the International Text-Book Company was doing business in Kansas, it was not doing that business which alone would subject it to the jurisdiction of Kansas courts; and because it was not doing such intrastate business, but purely interstate business, this court held that, as to it, the Kansas statute was unconstitutional and void under the commerce clause. The decision in the *Pigg* case, instead of sustaining, refutes defendant in error's contention. As Kansas could not require the Text-Book Company to file a statement with its Charter Board as a condition of doing interstate business there, neither can

Kentucky affix a consent to the jurisdiction of its courts as a condition of plaintiff in error's engaging in like interstate commerce in that state. And the reason is, as stated at page 110, and quoted from the *Crutcher* case:

> "Evidently because the matter is not within the province of state legislation, but within that of national legislation."

In *Delamater* v. *South Dakota*, 205 U. S., 93, Delamater was a traveling salesman of a St. Paul liquor concern and was prosecuted for soliciting orders in South Dakota without paying its annual license charge. The Wilson Act had specifically delegated to the states the right to control and regulate the liquor traffic, whether interstate or not. Following the ruling in the insurance cases, this court held that the state had a complete right to prevent the soliciting of liquor orders, and said (p. 104):

> "The ruling thus made is particularly pertinent to the subject of intoxicating liquors and the power of the state in respect thereto. As we have seen, the right of the states to prohibit the sale of liquor within their respective jursidictions in and by virtue of the regulation of commerce embodied in the Wilson Act is absolutely applicable to liquor shipped from one state into another after delivery and before the sale in the original package. *It follows that the authority of the states, so far as the sale of intoxicating liquors within their borders is concerned, is just as complete as is their right to regulate within their jurisdiction the making of contracts of insurance.*"

The case has absolutely no application to those at bar. South Dakota had the express permission of Congress to regulate interstate traffic in liquors and, moreover, the Act under which Delamater was convicted was held to be strictly a police regulation.

The quotations from the Cyclopedia of Law and Procedure appearing in opposing counsel's brief (p. 44) are

not in point here. All of the cases cited in support of them fall within the following classes:

(a) Where a statute provides that as a condition to the right of a foreign corporation—usually an insurance company—to do business in a state, service may be had upon a designated state officer as long as the company has any outstanding obligations in the state. In such cases it is held that as long as a company's obligations remain in force and the company is collecting premiums upon them, service upon the designated official is valid and his agency for the purpose of service is irrevocable. This is clearly correct. The mere withdrawal of the office of a foreign insurance company and a discontinuance by it of the effort to obtain new business is not the equivalent to a ceasing to do business in a state. As long as insurance companies have policies outstanding in a state and are collecting premiums on them, so long are such companies doing business in that state. And of course such a business is not an interstate commerce one, for insurance is not commerce.

(b) The other line of cases is where a company has withdrawn from a state and later sends its president or some other officer into that state on its behalf to transact some intrastate business for it. In such case at the time of the service such a company actually is doing business in the state—it is for all intents and purposes beginning *anew* its business in the state, and is as much subject to the state's jurisdiction as it was before it first withdrew from that state.

In our original brief (pp. 30, 31) we distinguished the present cases from the classes to which the quotations from the Cyclopedia refer. It is significant, that the court, in each of the cases there cited, either specifically finds that at the time of the service the defendant was actually doing business in the state, or had actually agreed, under the terms of a statute, that service might be had on designated state officers as long as the foreign corporation had outstanding liabilities. If counsel for

defendant in error were correct, there would have been no need of the court emphasizing the above points.

In the present case, on the contrary, the situation is precisely as though the plaintiff in error had never conducted any business in Kentucky, except the strictly interstate commerce business with residents of that state, in which it was engaged when service was attempted.

In the familiar and established rule, that a foreign corporation cannot be sued unless it be doing business in a state, the words "doing business in a state" do not include transacting interstate commerce.

Respectfully submitted,

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INTERNATIONAL HARVESTER COMPANY OF AMERICA *v.* COMMONWEALTH OF KENTUCKY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 297. Argued April 24, 1914.—Decided June 22, 1914.

It is essential to the rendition of a personal judgment against a corporation that it be doing business within the State; but each case must depend upon its own facts to show that this essential requirement of jurisdiction exists.

The presence of a corporation within a State necessary to the service of process is shown when it appears that the corporation is there carrying on business in such sense as to manifest its presence within the State, although the business may be entirely interstate in its character.

The fact that the business carried on by a corporation is entirely interstate in its character does not render the corporation immune from the ordinary process of the courts of the State.

147 Kentucky, 655, affirmed.

THE facts, which involve the validity and sufficiency of service of process upon a foreign corporation and the determination of whether such corporation was doing business within the State, are stated in the opinion.

Mr. Alexander Pope Humphrey and *Mr. Edgar A. Bancroft*, with whom *Mr. Victor A. Remy* was on the brief, for plaintiff in error in this case and in No. 298.[1]

For cases involving questions of service of process upon foreign corporations as controlled by the Constitution of the United States, see Ky. Stats., § 571 (1909); *Commonwealth* v. *Hogan & Co.*, 25 Ky. L. R. 41; *Commonwealth* v. *Eclipse Hay Press Co.*, 31 Ky. L. R. 824; *Three States*

[1] See p. 590, *post*.

Buggy Co. v. *Commonwealth*, 32 Ky. L. R. 385; *Goldey* v. *Morning News*, 156 U. S. 518; *Conley* v. *Mathieson*, 190 U. S. 406; *Caledonian Co.* v. *Baker*, 196 U. S. 432; *Remington* v. *Cent. Pac. R. Co.*, 198 U. S. 95; *Kendall* v. *Am. Loom Co.*, 198 U. S. 477; *Peterson* v. *C., R. I. & P. Ry. Co.*, 205 U. S. 364; *Green* v. *C., B. & Q. R. R. Co.*, 205 U. S. 530; *Mechanical Appliance Co.* v. *Castleman*, 215 U. S. 437; *Saxony Mills* v. *Wagner*, 94 Mississippi, 233; *Fawkes* v. *Am. Motor Co.*, 176 Fed. Rep. 1010.

At the time of the attempted service the defendant was doing nothing but an interstate commerce business with the people of Kentucky. *Commonwealth* v. *Chattanooga Co.*, 126 Kentucky, 636; *Brennan* v. *Titusville*, 153 U. S. 289; *Caldwell* v. *North Carolina*, 187 U. S. 621.

The carrying on of interstate commerce by the defendant with persons residing in this State does not constitute a doing of business in Kentucky. Cases *supra*, and *Havens* v. *Diamond*, 93 Ill. App. 557.

Merely soliciting orders is not doing business in a State. Cases *supra*, and *Green* v. *C., B. & Q. Ry. Co.*, 205 U. S. 530; *North Wisconsin Cattle Co.* v. *Oregon Short Line*, 105 Minnesota, 198; *Earle* v. *Ches. & Ohio Ry. Co.*, 127 Fed. Rep. 235, 240; *Fairbank* v. *Cincinnati &c. Ry. Co.*, 54 Fed. Rep. 420, 423; *Grace* v. *Martin Brick Co.*, 174 Fed. Rep. 131, 132; Kentucky Civil Code of Practice, § 51, subd. 3 and 6.

To hold that defendant can be prosecuted in these cases would violate the commerce clause of the Constitution. *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 27; *Hadley-Dean Co.* v. *Highland Glass Co.*, 143 Fed. Rep. 242, 244; *Albertype Co.* v. *Gust-Feist Co.*, 102 Texas, 219; *Eclipse Paint Co.* v. *New Process Roofing Co.*, 55 Tex. Civ. App. 553; *Moroney Co.* v. *Goodwin Pottery Co.* (Tex. Civ. App.), 120 S. W. Rep. 1088, 1091.

The fact that the Harvester Company formerly carried on business in Kentucky does not alter the situation.

Conley v. *Mathieson Alkali Works*, 190 U. S. 406; *International Textbook Co.* v. *Pigg*, 217 U. S. 91; *St. Louis S. W. Ry.* v. *Alexander*, 227 U. S. 226.

Under the construction given the Kentucky Process Statute by the Court of Appeals a person or corporation doing exclusively an interstate commerce business must submit to the jurisdiction of Kentucky courts.

The submission to the state courts, which is requisite to render foreign corporations subject to suit, cannot be compelled or implied where such corporation does only an interstate commerce business.

The cases relied upon by the Commonwealth do not support its contentions.

Mr. Charles Carroll, with whom *Mr. James Garnett*, Attorney General of the State of Kentucky, *Mr. Frank E. Daugherty*, *Mr. J. R. Mallory*, *Mr. J. C. Dedman*, *Mr. C. R. Hill* and *Mr. C. D. Florence* were on the brief, for defendant in error in this case and in No. 298:[1]

Plaintiff in error cannot raise the question in this court that the proceedings against it in these cases were a denial to it of due process of law. Section 157, Crim. Code, Kentucky; *Commonwealth* v. *Cheek*, 1 Duval, 26; *Commonwealth* v. *Neat*, 89 Kentucky, 242; *Payne* v. *Commonwealth*, 16 Ky. L. R. 839; *Sharp* v. *Commonwealth*, 16 Ky. L. R. 840; *York* v. *Texas*, 137 U. S. 15–20; *Cosmopolitan Mining Co.* v. *Walsh*, 193 U. S. 469.

The process in this case was served upon the proper person and the judgment rendered thereon was valid and binding. *St. Louis S. W. R. R. Co.* v. *Alexander*, 227 U. S. 227.

As to effect of the instructions to agents from the plaintiff in error, see *Good Roads Co.* v. *Commonwealth*, 146 Kentucky, 690; *Boyd Commission Co.* v. *Coates*, 24 Ky. L. R. 730; *Nelson Morris* v. *Rehkopf*, 25 Ky. L. R. 352; *Green* v.

[1] See p. 590, *post*.

Chicago &c. R. R. Co., 205 U. S. 530; *Denver &c. R. R. Co.* v. *Roller*, 100 Fed. Rep. 938; *International Textbook Co.* v. *Pigg*, 217 U. S. 91; *Delamater* v. *South Dakota*, 125 U. S. 93; 19 Cyc. 1347–1348.

To hold that plaintiff in error was properly served with process and the judgment rendered against it valid will not violate the commerce clause of the Constitution. *International Harvester Co.* v. *Commonwealth*, 147 Kentucky, 657.

Mr. Justice Day delivered the opinion of the court.

This case presents the question of the sufficiency of the service of process on an alleged agent of the International Harvester Company in a criminal proceeding in Breckenridge County, Kentucky, in the court of which county an indictment had been returned against the Harvester Company for alleged violation of the anti-trust laws of the State of Kentucky. The Harvester Company appeared and moved to quash the return, substantially upon the ground that service had not been made upon an authorized agent of the company and that the company was not doing business within the State of Kentucky, and it set up that any action under the attempted service would violate the due process and commerce clauses of the Federal Constitution. The only question involved, says the Court of Appeals, and we find none other in the record, is whether there was such service of process as would sustain the judgment. The court overruled the motion, and, the case being called for trial and the Harvester Company failing to appear or plead, judgment by default for $500 penalty was entered against it, which was affirmed by the Court of Appeals of Kentucky (147 Kentucky, 655).

It appeared that prior to October 28, 1911, before this indictment was returned, the Harvester Company had

been doing business in Kentucky and had designated Louisville, Kentucky, as its principal place of business, in compliance with the statutes of Kentucky in that respect. It further appeared that the Company had revoked the agency of one who had been appointed under the Kentucky statute and had not appointed anyone else upon whom process might be served.

It is conceded in the brief of the learned counsel for the plaintiff in error that whether the person upon whom process was served was one designated by the law of Kentucky as an agent to receive summons on behalf of the Harvester Company was a question within the province of the Court of Appeals of Kentucky to finally determine, and no review of that decision is asked here. We come then to the first question in this case, which is, Whether under the circumstances shown in this case the Harvester Company was carrying on business in the State of Kentucky in such manner as to justify the courts of that State in taking jurisdiction of complaints against it.

For some purposes a corporation is deemed to be a resident of the State of its creation, but when a corporation of one State goes into another in order to be regarded as within the latter it must be there by its agents authorized to transact its business in that State. The mere presence of an agent upon personal affairs does not carry the corporation into the Foreign state. It has been frequently held by this court, and it can no longer be doubted that it is essential to the rendition of a personal judgment that the corporation be "doing business" within the State. *St. Louis S. W. Ry.* v. *Alexander*, 227 U. S. 218, 226, and cases there cited. As was said in that case, each case must depend upon its own facts, and their consideration must show that this essential requirement of jurisdiction has been complied with and that the corporation is actually doing business within the State.

In the case now under consideration the Court of Ap-

peals of Kentucky found, with warrant for the conclusion, that the Harvester Company's method of conducting business might be shown to the best advantage from the general instruction of the company to its agents of date November 7, 1911, as follows:

"The Company's transactions hereafter with the people of Kentucky must be on a strictly interstate commerce basis. Travelers negotiating sales must not hereafter have any headquarters or place of business in that State, but may reside there.

"Their authority must be limited to taking orders, and all orders must be taken subject to the approval of the general agent outside of the State, and all goods must be shipped from outside of the State after the orders have been approved. Travelers do not have authority to make a contract of any kind in the State of Kentucky. They merely take orders to be submitted to the general agent. If any one in Kentucky owes the Company a debt, they may receive the money, or a check, or a draft for the same but they do not have any authority to make any allowance or compromise any disputed claims. When a matter cannot be settled by payment of the amount due, the matter must be submitted to the general or collection agent, as the case may be, for adjustment, and he can give the order as to what allowance or what compromise may be accepted. All contracts of sale must be made f. o. b. from some point outside of Kentucky and the goods become the property of the purchaser when they are delivered to the carrier outside of the State. Notes for the purchase price may be taken and they may be made payable at any bank in Kentucky. All contracts of any and every kind made with the people of Kentucky must be made outside of that State, and they will be contracts governed by the laws of the various States in which we have general agencies handling interstate business with the people of Kentucky. For example, contracts

made by the general agent at Parkersburg, W. Va., will be West Virginia contracts.

"If any one of the Company's general agents deviates from what is stated in this letter, the result will be just the same as if all of them had done so. Anything that is done that places the Company in the position where it can be held as having done business in Kentucky, will not only make the man transacting the business liable to a fine of from one hundred to one thousand dollars for each offense, but it will make the Company liable for doing business in the State without complying with the requirements of the laws of the State. We will, therefore, depend upon you to see that these instructions are strictly carried out."

Taking this as the method of carrying on the affairs of the Harvester Company in Kentucky, does it show a doing of business within that State to the extent which will authorize the service of process upon its agents thus engaged?

Upon this question the case is a close one, but upon the whole we agree with the conclusion reached by the Court of Appeals, that the Harvester Company was engaged in carrying on business in Kentucky. We place no stress upon the fact that the Harvester Company had previously been engaged in doing business in Kentucky and had withdrawn from that State for reasons of its own. Its motives cannot affect the legal questions here involved. In order to hold it responsible under the process of the state court it must appear that it was carrying on business within the State at the time of the attempted service. As we have said, we think it was. Here was a continuous course of business in the solicitation of orders which were sent to another State and in response to which the machines of the Harvester Company were delivered within the State of Kentucky. This was a course of business, not a single transaction. The agents not only solicited such orders

in Kentucky, but might there receive payment in money, checks or drafts. They might take notes of customers, which notes were made payable, and doubtless were collected, at any bank in Kentucky. This course of conduct of authorized agents within the State in our judgment constituted a doing of business there in such wise that the Harvester Company might be fairly said to have been there, doing business, and amenable to the process of the courts of the State.

It is argued that this conclusion is in direct conflict with the case of *Green* v. *Chicago, Burlington & Quincy Ry.*, 205 U. S. 530. We have no desire to depart from that decision, which, however, was an extreme case. There the Railway Company, carrying on no business in Pennsylvania, other than that hereinafter mentioned, and having its organization and tracks in another State, was sought to be held liable in the Circuit Court of the United States for the Eastern District of Pennsylvania by service upon one Heller, who was described as an agent of the corporation. As incidental and collateral to its business proper the Company solicited freight and passenger traffic in other parts of the country than those through which its tracks ran. For that purpose it employed Heller, who had an office in Philadelphia, where he was known as district freight and passenger agent, to procure passengers and freight to be transported over the Company's line. He had clerks and travelling passenger and freight agents who reported to him. He sold no tickets and received no payment for the transportation of freight, but took the money of those desiring to purchase tickets and procured from one of the railroads running west from Philadelphia a ticket for Chicago and a prepaid order which gave the holder the right to receive from the Company in Chicago a ticket over its road. Occasionally he sold to railroad employés, who already had tickets over intermediate lines, orders for reduced rates over the Company's line.

In some cases for the convenience of shippers who had received bills of lading from the initial line for goods routed over the Company's line, he exchanged bills of lading over its line, which were not in force until the freight had been actually received by the Company. Summarizing these facts, Mr. Justice Moody, speaking for the court, said (p. 533): "The business shown in this case was in substance nothing more than that of solicitation. Without undertaking to formulate any general rule defining what transactions will constitute 'doing business' in the sense that liability to service is incurred, we think that this is not enough to bring the defendant within the district so that process can be served upon it."

In the case now under consideration there was something more than mere solicitation. In response to the orders received, there was a continuous course of shipment of machines into Kentucky. There was authority to receive payment in money, check or draft, and to take notes payable at banks in Kentucky.

It is further contended that as enforced by the decision of the Kentucky court the law, in its relation to interstate commerce, operates to burden that commerce. It is argued that a corporation engaged in purely interstate commerce within a State cannot be required to submit to regulations such as designating an agent upon whom process may be served as a condition of doing such business, and that as such requirement cannot be made the ordinary agents of the corporation, although doing interstate business within the State, cannot by its laws be made amenable to judicial process within the State. The contention comes to this, so long as a foreign corporation engages in interstate commerce only it is immune from the service of process under the laws of the State in which it is carrying on such business. This is indeed, as was said by the Court of Appeals of Kentucky, a novel proposition, and we are unable to

find a decision to support it, nor has one been called to our attention.

True, it has been held time and again that a State cannot burden interstate commerce or pass laws which amount to the regulation of such commerce; but this is a long way from holding that the ordinary process of the courts may not reach corporations carrying on business within the State which is wholly of an interstate commerce character. Such corporations are within the State, receiving the protection of its laws, and may, and often do, have large properties located within the State. In *Davis* v. *Cleveland, C., C. & St. L. Ry.*, 217 U. S. 157, this court held that cars engaged in interstate commerce and credits due for interstate transportation are not immune from seizure under the laws of the State regulating garnishment and attachment because of their connection with interstate commerce, and it was recognized that the States may pass laws enforcing the rights of citizens which affect interstate commerce but fall short of regulating such commerce in the sense in which the Constitution gives sole jurisdiction to Congress, citing *Sherlock* v. *Alling*, 93 U. S. 99, 103; *Johnson* v. *Chicago & Pacific Elevator Co.*, 119 U. S. 388; *Kidd* v. *Pearson*, 128 U. S. 1, 23; *Pennsylvania R. R. Co.* v. *Hughes*, 191 U. S. 477; and *The Winnebago*, 205 U. S. 354, 362, in which this court sustained a lien under the laws of Michigan on a vessel designed to be used in both foreign and domestic trade.

In *International Textbook Co.* v. *Pigg*, 217 U. S. 91, it was held that a law of Kansas which required the filing by a foreign corporation engaged in interstate commerce of a statement of its financial condition as a prerequisite of the right to do such business and which required a certificate from the Secretary of State showing that such statements had been filed as a condition precedent to the right of the corporation to maintain a suit in that State, was void. But that case did not hold, as we should be

required to do to sustain the contention of the plaintiff in error in this case, that the fact that the corporation was carrying on interstate commerce business through duly authorized agents made it exempt from suit within the State by service upon such agents.

We are satisfied that the presence of a corporation within a State necessary to the service of process is shown when it appears that the corporation is there carrying on business in such sense as to manifest its presence within the State, although the business transacted may be entirely interstate in its character. In other words, this fact alone does not render the corporation immune from the ordinary process of the courts of the State.

It follows that the judgment of the Court of Appeals of Kentucky must be

Affirmed.

INTERNATIONAL HARVESTER COMPANY OF AMERICA *v.* COMMONWEALTH OF KENTUCKY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 298. Argued April 24, 1914.—Decided June 22, 1914.

Where the state court has denied a motion to quash the service of process on a foreign corporation, and has also held that the statute on which the action is based is not unconstitutional, both the question of validity of the service and that of the constitutionality of the act are before this court for review.

International Harvester Company v. *Kentucky*, *ante*, p. 579, followed to effect that the plaintiff in error was doing business in the State in which process was served.

International Harvester Company v. *Kentucky*, *ante*, p. 216, followed to the effect that the provision of the anti-trust statute of Kentucky

under which this suit was brought is unconstitutional under the due process provision of the Fourteenth Amendment.
149 Kentucky, 41, reversed.

THE facts, which involve the sufficiency of service of process upon a foreign corporation doing business in the State of Kentucky and also the constitutionality of the anti-trust act of Kentucky, are stated in the opinion.

Mr. Alexander Pope Humphrey and *Mr. Edgar A. Bancroft*, with whom *Mr. Victor A. Remy* was on the brief, for plaintiff in error in this case and in No. 297.[1]

Mr. Charles Carroll, with whom *Mr. James Garnett*, Attorney General of the State of Kentucky, *Mr. Frank E. Daugherty*, *Mr. J. R. Mallory*, *Mr. J. C. Dedman*, *Mr. C. R. Hill* and *Mr. C. D. Florence*, were on the brief, for defendant in error in this case and in No. 297.[1]

MR. JUSTICE DAY delivered the opinion of the court.

A penal action was instituted by the defendant in error against the plaintiff in error in the Boyle Circuit Court of Kentucky under the anti-trust laws of that State. Summons having been served upon an alleged agent of the plaintiff in error, it filed a motion to quash the return for the reason, as alleged, that the person upon whom service had been made was not the authorized agent of the plaintiff in error and that it was not doing business in Kentucky. The facts in this case which are identical with those set out in the previous case, *International Harvester Company of America* v. *The Commonwealth of Kentucky*, just decided, *ante*, p. 579, show that the plaintiff in error had prior to the commencement of this action revoked the authority of an agent designated by it in com-

[1] For abstracts of arguments see *ante*, p. 579.

pliance with the laws of Kentucky and had removed its office from the State, but that it had continued through its agents, the party served in this case being one of them, to solicit orders to be accepted outside of the State for the sale of machines which were to be delivered in Kentucky, and that its agents were authorized to receive money, checks and drafts in payment therefor, or take the notes of purchasers payable at any bank in Kentucky.

There are two questions in this case. The Court of Appeals, deciding that this case was governed by the previous case from Breckenridge County (147 Kentucky, 655), held that the service was good and that the anti-trust act was not unconstitutional and violative of the Fourteenth Amendment to the United States Constitution. 149 Kentucky, 41. Since the Federal question involving the validity of the anti-trust act was considered and decided adversely in the Court of Appeals, it, as well as the question of due service, is properly before us. *Miedreich* v. *Lauenstein*, 232 U. S. 236, 243, and cases there cited.

As we have just dealt with the sufficiency of service in the previous case, involving the same question, it may be disposed of here by merely referring to that decision. And as the constitutional validity of the anti-trust act was specifically determined in cases Nos. 276, 291 and 292, entitled *International Harvester Company of America* v. *The Commonwealth of Kentucky*, decided June 8, 1914, *ante*, p. 216, that question is also concluded.

We therefore reach the conclusion that the plaintiff in error was doing business in Kentucky and that the service was sufficient, but that the law under which the action was brought is unconstitutional and that the judgment of the Court of Appeals must be reversed, and accordingly remand the case to that court for further proceedings not inconsistent with this opinion.

Reversed.